83-1438

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

SOPHIA E. SELMAN, as Executrix of the Estate of RICHARD J. SELMAN, Deceased,

and

SHIRLEY MARIE SHARRATT, as Executrix of the Estate of GEORGE S.H. SHARRATT, JR., Deceased,

Petitioners,

v.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Federal Circuit

Penrose Lucas Albright
2306 South Eads Street
Arlington, VA 22202
(703) 979-3242
Attorney for Petitioners

Mason, Mason & Albright
Of Counsel

QUESTIONS PRESENTED

1. Where the Secretary of the Navy did not set forth grounds for a denial under 10 U.S.C. §1552 in the face of regulations requiring him to do so and discovery was denied Petitioners to ascertain such grounds (which, inter alia, may have involved statutory violations) is it proper for the U.S. Court of Appeals to infer a rationale (that is one among several possible) for the Secretary's action and therefore not remand?

2. Are the lower Courts' interpretations of "grade" as not encompassing a "pay grade" in 10 U.S.C. §§1372, 1401 and 6323 correct?

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OPINIONS BELOW

The opinion of the Court of Appeals is reported in 723 F.2d 877, (Fed. Cir. 1983). That opinion along with the order granting the Petition for Rehearing to the extent that language in the opinion was amended and added, but denying it in all other respects, and the appealed decision of the U.S. Claims Court, reported at 1 Cl. Ct. 702, are in the Appendix. The findings and recommendations of the Board for Correction of Naval Records and the Memorandum of the Assistant Secretary of the Navy (Manpower and Reserve Affairs) are also in the Appendix.

JURISDICTION

The opinion and judgment of the Court of Appeals were dated and entered October 28, 1983. A timely Petition

for Rehearing was denied December 1, 1983. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The case involves Sections 101(18), 277, 1372, 1401, 1552, 5149 and 6323 in Title 10 U.S. Code (1976) and Sections 723.7 and 723.3(e)(5) in Title 32, Code of Federal Regulations. Their pertinent texts are set forth in the Appendix.

STATEMENT OF THE CASE

Captains Selman and Sharratt were AJAGs (Assistant Judge Advocates General of the Navy) who served in positions established by 10 U.S.C. §5149(b), a legislative compromise to accommodate the Stennis ceiling on flag officers and a need to encourage careers in the Judge Advocate General's Corps of the Navy. As a result, they

served in the officer grade of Captain (0-6) while entitled to the pay grade of 0-7's (Rear Admirals (lower half)). Selman v. United States, 498 F.2d 1354 204 Ct. Cl. 675 (1974) confirms their entitlement to active duty 0-7 pay. The decision eventually benefited about eight other Navy and Marine officers similarly situated.

Captain Sharratt retired shortly before and Captain Selman during the litigation in Selman v. United States, supra. Both died in the course of subsequent proceedings and their widows, as executrices of their estates, are carrying on their cause.

After judgment was entered in Selman v. United States, supra, Captains Selman and Sharratt applied to the BCNR (Board for Correction of Naval Records) for corrections to their

records retroactively retiring them in the grade and with the retired pay of rear admirals (lower half) under §5149(b) which authorized the President (delegated to the Secretary of the Navy) so to retire AJAGs. The Judge Advocate General of the Navy has held such authority can only be exercised at the time the officers retired, not afterwards, except by a retroactive correction through the BCNR.

The asserted error submitted for the BCNR's action was that the Secretaries, John Chafee and John W. Warner, when Captains Sharratt and Selman retired did not have an opportunity to exercise Presidential authority under §5149(b) and that they would have done so.

Chafee and Warner, now serving as U.S. Senators, addressed letters to the

BCNR noting they had respectively awarded Legions of Merit to Captains Sharratt and Selman and indicated, had they been given the opportunity, they would have retired Captains Sharratt and Selman as 0-7s.

The Chief of Naval Personnel, then Vice Admiral James D. Watkins, objected to Captains Sharratt's and Selman's retirements as 0-7s. His objection was not to them personally; he considered it would be inequitable to promote them to 0-7s on retirement because they had not been selected by a Selection Board to that rank as is the case with almost all other Naval officers retired with flag rank. Subsequently Chafee sent another letter to the BCNR stating, after considering Watkins' objections, he would have retired Captain Sharratt as 0-7 (and Cap-

tain Selman also) had he been given the opportunity notwithstanding Watkins' objections.

The BCNR found error existed as alleged except, instead of making findings how Chafee and Warner would have acted, given opportunity, and "notwithstanding comments of the Judge Advocate General to the contrary," made the markedly unique recommendation that the Secretary of the Navy exercise discretion under 10 U.S.C. §5149(b) "nunc pro tunc." Two proposed actions, only one to be executed, were included. Neither sets forth grounds therefor. The Assistant Secretary of the Navy (Manpower and Reserve Affairs) approved the BCNR's report and signed actions "For the President" concluding Captains Selman's and Sharratt's 0-7 retirements were not warranted under §5149(b).

Almost immediately thereafter Petitioners sued in the U.S. Court of Claims under 28 U.S.C. §1491 (superseded by the new U.S. Claims Court) for O-7 pay on two separate grounds: (1) that the BCNR and Secretary acted arbitrarily and capriciously under §1552 and (2) that Petitioners were entitled to O-7 retired pay in any event under existing retirement statutes. Fifteen days after filing suit, Petitioners served interrogatories on Defendant to learn what really lay behind the Secretary's conclusions. But such discovery was not permitted because Chief Judge Kozinski of the U.S. Claims Court found the Secretary's acted directly under §5149(b) and, such action being "For the President", his action was discretionary and not reviewable.

The Court of Appeals did not agree with the Chief Judge or the concurring position of the Government attorney. It instead considered the Secretary acted under §1552. But it also found the evidence before the BCNR sufficient to sustain the Secretarial denial under §1552 and held the case did not need to be remanded because the Secretary failed to set forth grounds for his denial as required by 32 C.F.R. §§723.7 and 723.3(e)(5).

Both Courts agreed "grade" unmodified in retirement statutes referred to "officer grade" and not to "pay grade."

REASONS FOR GRANTING THE WRIT

I

The Court Appeals has formulated a unique principle of administrative law to the effect that although it may be error to omit findings entirely,

this defect does not require remand if a basis for the administrative action can be found in the evidence. This rule conflicts with opinions of other circuits, particularly those of the U.S. Court of Appeals for the District of Columbia Circuit and as laid down by this Court. It is hornbook law that administrative findings are not procedural niceties and Courts should not be left to choose between conflicting inferences. USV Pharmaceutical Corp. v. Secretary of Health, Education and Welfare, 466 F.2d 455, 462 (D.C. Cir. 1972); Secretary of Agriculture v. United States, 347 U.S. 645, 654 (1954).

The Court of Appeal's decision even conflicts with cases it cites for support, Environmental Defense Fund v. Environmental Protection Agency, 465

F.2d 528 (D.C. Cir. 1972) and USV Pharmaceutical Corp. v. Secretary of Health, Education and Welfare, supra.

This rule, that findings may be omitted where specifically required, if allowed to stand unreviewed, introduces a wild card into the standards of judicial review of administrative decisions, encourages laxity by administrative agencies and, if unchecked, will ultimately increase the workload of federal courts in reviewing administrative agency decisions.

At the very least it condones a different and a less demanding standard of judicial review for §1552 adverse actions than otherwise applied to federal agencies. To this extent it tells those who serve or have served in the Armed Forces, their widows and or-

phans, that in the realm of judicial review they are second class citizens.

II

The lower Courts' interpretations of retirement statutes might not be so bad if the issues were of first impression. But the Courts have effectively overruled (albeit they state "distinguished") Powers v. United States, 401 F.2d 813, 185 Ct. Cl. 421 (1968) which was rendered in view of the legislative history of 10 U.S.C. §6323 and has been a keystone for subsequent administrative decisions that military retired pay should be based on the highest active duty pay received. See 49 Comp. Gen. 618 (1970).

Moreover, one or more Navy Judge Advocates General have served on Selection Boards wherein statutorily all

members must have a higher temporary and permanent grade than those being considered. Because of an anomaly under prior law, they did not have a flag "officer grade," as such, and membership was justified solely on grounds of their higher "pay grade." The decision thus places a cloud on the legality of such Selection Boards and promotions flowing therefrom.

At least one former AJAG retired directly from such position for disability may be receiving 0-7 retired pay on the basis of Powers, supra, and there are other situations in which unexpected financial dislocations may occur, absent review by this Court or subsequent Congressional remedy.

III

The BCNR was created under §1552 following World War II to relieve Congress of an overburden in private bills related to wrongs suffered by Service personnel. Such correction boards are statutorily civilian and make findings and recommendations. To be implemented, recommended corrections must be approved by the Secretary. If instead he denies same, he must set forth his reasons pursuant to 32 C.F.R. §§723.7 and 723.3(e)(5)[1]. When the Secretary corrects a record under §1552, he is carrying out a delegated legislative authority with the ultimate source of authority being from Article I of the Constitution. In contrast, when the

[1]These regulations were adopted as required by a Stipulation for Dismissal in Urban Law Institute of Antioch College, Inc. et al v. Secretary of Defense et al, approved by the U.S. District Judge January 31, 1977, Civil Action No. 76-530, U.S. District Court for the District of Columbia.

Secretary appoints an AJAG to rear admiral (lower half) under §5149(b), he acts for the President with the ultimate source of authority being Article II of the Constitution.

The U.S. Claims Court and Government attorney (in her arguments) considered the Secretary's denial was directly under §5149(b). Therefore no findings were required. But the conclusion that the Secretary could have acted directly under §5149(b) is flawed because this Court held in U.S. v. Burchard, 125 U.S. 176 (1888), that a statute giving authority to appoint is not authority to make retroactive appointments unless Congressional intent is clear. See also: DuBose v. U.S., 65 Ct. Cl. 142 (1928).

The Court of Appeals disagreed with the Claims Court and found the

Secretary had acted through the civilian BCNR under §1552 and not directly under §5149(b). Although the Secretary failed to set forth grounds for his action (consistent with §5149(b) but inconsistent with §1552 and governing regulations) the Court found the record disclosed sufficient reasons for denying Captains Sharratt and Selman based on Watkins' objections to any AJAGs being promoted on retirement to O-7 grade under §5149(b). Recognizing Watkins' opposition "may be criticized as being in effect opposition to the statute, §5149(b) itself", the Court held there was nothing "to show that Congress intended to leave the Secretary free to refuse promotion for grounds applicable to all" [Emphasis supplied]. But this rationale cannot bear factual scrutiny. Evidence, if permitted, will

establish at least one AJAG (Colonel Moore) was promoted on retirement. Since §5149(b) is applicable to Reserves as well as Regulars, under 10 U.S.C. §277, it must be "administered without discrimination."

The conflict between the Claims Court and the Court of Appeals highlights that we do not know why the Secretary acted as he did. The assessment of either Court could be correct and there could be other grounds. Vice Admiral Watkins is now Admiral Watkins, the Chief of Naval Operations, who was working in harness with the Secretary to achieve the Navy's goal of 600 ships. If the Secretary considered he was acting under §5149(b) with no strings attached, he very well might have acted differently than if constrained to act under §1552 as Chafee and Warner would

have acted given the opportunity to do so.

Moreover, it is not unknown for Secretaries to deny corrections based on non-civilian recommendations obtained outside §1552 channels, without informing the Board, petitioners or their counsel. See Hertzog v. U.S., 167 Ct. Cl. 377 (1964); Proper v. U.S. 154 F.Supp. 317, 139 Ct. Cl. 511 (1957) and Weiss v. U.S., 408 F.2d 416, 187 Ct. Cl. 1 (1969). In an earlier Weiss v. U.S., 180 Ct. Cl. 863 (1967), discovery of the type denied here (a fortiori prior to adoption of 32 C.F.R. §§723.7 and 723.3(e)(5)) produced evidence that the Secretary did not act through his civilian board but rather acted on the basis of proscribed recommendations which never could have been proved, absent discovery. In other

words, Weiss won because of discovery almost identical to that sought by Petitioners. But unless remanded, we'll never know whether Petitioners might prevail on the same basis because discovery was denied.

The plain truth is that the lower courts, in bending over backwards to accommodate the Secretary's denial, reached their decisions by standing the law on its head.

As (1) suggested by the disagreement between the Claims Court and the Court of Appeals on the basis for the Secretary's actions and (2) hinted by the latter's protesting too much that it did not find the Secretary's omission "trivial", the decision is such a radical departure from well-established precedent of other circuits, and in the process has so eroded an important

remedy available to service personnel that review by this Court is appropriate and necessary.

CONCLUSION

For the reasons stated, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

By: _____
Penrose Lucas Albright

2306 South Eads Street
Arlington, VA 22202
(703) 979-3242
Attorney for Petitioners

Of counsel:

MASON, MASON & ALBRIGHT

APPENDIX

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SOPHIA E. SELMAN, as Executrix of the Estate of RICHARD J. SELMAN, Deceased,

and

SHIRLEY MARIE SHARRATT, as Executrix of the Estate of GEORGE S. H. SHARRATT, JR., Deceased,

Appellants,

v. Appeal No. 83-840

THE UNITED STATES

Appellee.

DECIDED: October 28, 1983

Before DAVIS, Circuit Judge, NICHOLS,* Senior Circuit Judge, and MILLER, Circuit Judge.

*Judge Nichols assumed senior status effective October 1, 1983.

Nichols, Senior Circuit Judge.

This is an appeal from a judgment of the United States Claims Court (No. 507-82C), entered March 7, 1983, dismissing the plaintiffs' complaint in response to the United States' motion for a judgment on the pleadings. We affirm.

BACKGROUND

Captain Sharratt served as Assistant Judge Advocate General of the Navy (Civil Law) from July 16, 1968, until his retirement on October 1, 1970. Captain Selman served as Assistant Judge Advocate General of the Navy (Military Law) from August 20, 1968, until May 1, 1972. He then served in another position until July 1, 1973, at which time he was placed on the Temporary Disability Retired list. His disability retirement was eventually made

permanent. While serving as Assistant Judge Advocates General (AJAGs), both men held the rank of captain and were compensated on the basis of an 0-6 pay grade.

In 1972, Captains Selman and Sharratt (the captains), brought an action against the United States in the then Court of Claims. Selman v. United States, 498 F.2d 1354 (Ct. Cl. 1974) (Selman I). The captains argued that 37 U.S.C. §202(1)[1/] entitled AJAGs to the basic pay of a rear admiral (lower half). The Court of Claims agreed, and raised the captains' active duty pay to the pay grade 0-7. The

[1]Some of the Code provisions at issue in this case have been amended in ways not applicable to the captains' claims. See e.g., Defense Officer Personnel Management Act of 1980, Pub. L. No. 96-513, 94 Stat. 2904. For ease of reference, all citations are to the United States Code provisions in force at the time of the captains' retirements.

Court of Claims, however, did not promote Selman and Sharratt from captains to rear admirals. Selman I, F.2d at 1359.

After the captains retired, they received retirement pay computed on the basis of the 0-6 pay grade of captain rather than the higher active duty pay they were awarded in Selman I. In March 1976, the captains petitioned the Board for Correction of Naval Records (board or BCNR) under 10 U.S.C. §1552 for the higher retirement pay grade, alleging that the respective Secretaries of the Navy (Secretaries) had never been given the opportunity to exercise the discretion delegated to them by the President pursuant to 10 U.S.C. §5149(b). That section grants the President the discretion to retire, with the rank and grade of rear admiral

(lower half), an officer who has served as an AJAG of the Navy for more than 12 months. Since it had yet to be determined that an AJAG was entitled to the basic pay of a rear admiral (lower half) while on active duty, it appears that no one considered it necessary to give the Secretaries the opportunity to exercise the Presidential discretion when the captains retired.

On May 29, 1981, the board formally acted. It agreed with the captains that the Secretaries had never been given the opportunity to exercise the delegated Presidential discretion. Rather than itself reach any conclusion as to the merits, however, the board wrote to the current Secretary that the most appropriate remedial action was for him to decide the captains' cases himself, nunc pro tunc. (The record is

unclear as to whether the board asked the Secretary to make a record correction under 10 U.S.C. §1552 or whether the board thought the Secretary was acting under the original authority granted him by 10 U.S.C. §5149(b).) The Assistant Secretary of the Navy, Manpower and Reserve Affairs, summarily denied the captains' petitions on July 16, 1982. The captains filed suit in the then United States Court of Claims on September 30, 1982. Jurisdiction was transferred, effective October 1, 1982, to the new United States Claims Court. The Claims Court granted the United States' motion for a judgment on the pleadings and dismissed the complaint. This appeal followed.

Opinion

The captains advance two separate legal theories to support their claims.

First, they allege that the board's action were arbitrary and capricious. The captains' argument is premised on their belief that the BCNR should have promoted them if it found that the captains would have been promoted when they retired. The captains argue in other words, that the only authority present here is that of the BCNR to act under 10 US.C. §1552 to correct an error which arose at the time the captains retired.

The second theory which the captains propound is that the statutes under which their retirement pay is calculated require that they receive retired pay based on the highest pay received while on active duty. Under this theory, board action under §1552 is not required. Since they received the pay of a rear admiral (lower half),

the captains argue, they are now entitled to retired pay based on that rate. We considered both theories in order.

I

The United States argues that the Claims Court has no jurisdiction to review a purely discretionary action taken by the Secretary of the Navy pursuant to 10 U.S.C. §5149(b). Section 5149(b) grants the President the authority to use his discretion to retire an officer, who has served as an AJAG for more than 12 months, with the rank and grade of rear admiral (lower half). The pertinent part of that section provides:

> An officer who is retired while serving as Assistant Judge Advocate General of the Navy under this subdivision or who, after serving at least twelve months as Assistant Judge Advocate General of the Navy, is retired after completion of that service

> while serving in a lower rank or grade, may, in the discretion of the President, be retired with the rank and grade of rear admiral (lower half). If he is retired as a rear admiral, he is entitled to retired pay in the lower half of that grade, unless entitled to higher pay under another provision of the law.

[10 U.S.C. §5149(b).]

The President has delegated the authority created by this section to the Office of the Secretary of the Navy.

The government argues that no purely discretionary act by the Secretary can be reviewed under §5149(b), no matter how arbitrary or capricious. We decline the opportunity to decide the question here since we find the Secretary's action, or decision not to act, was not made pursuant to the discretionary authority granted in section 5149(b), but instead, pursuant to 10 U.S.C. §1552. Section 1552 provides, in pertinent part:

> The Secretary of a military department, * * * acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice.

[10 U.S.C. §1552(a).]

Since it was through the BCNR that the Secretary acted in this case, we hold that the Claims Court did have jurisdiction. We are unable to find, however, that either the BCNR or the Secretary acting through the BCNR engaged in any arbitrary or capricious action. There is, therefore, no need to remand.

The BCNR is established, and its powers delineated, by 32 C.F.R. §§723.1-.11 (1982). The board has the authority to consider all applications before it for the purpose of determining the existence of an error or an injustice. In appropriate circum-

stances, it can make recommendations to the Secretary. 32 C.F.R. §723.2(b). The board is directed to prepare a record when its deliberations are complete. 32 C.F.R. §723.6(c). The board may, within this record, make findings, conclusions, and recommendations. Id. The BCNR may also take final action on behalf of the Secretary in specific enumerated circumstances. 32 C.F.R. §723.6(e). There is no requirement that the BCNR must take final action in any situation, however. Therefore, it was entirely proper for the BCNR to merely pass the record to the Secretary so that he could determine the appropriate action.

The captains try to persuade us that the BCNR erred in not making findings to the effect that the Secretaries of the Navy at the time of the cap-

tains' retirements would have retired them with the rank of rear admiral and the pay grade of 0-7. The BCNR did find an error or injustice in the failure to pass on the question on the dates of retirement, but it refused to find how the then Secretaries would have decided if the issue of retirement rank had been presented to them for decision, as it should have been. The captains point out to us letters submitted to the board from former Secretaries of the Navy, and now Senators, John Warner and John Chafee, to the effect that they would have promoted the captains pursuant to the authority granted to them if they had been apprised of section 5149(b) when the captains retired. We cannot hold that the board's failure to make the findings is arbitrary or capricious, however. There

was sufficient contrary evidence in the record so that the BCNR could reasonably have concluded otherwise. In particular, a memorandum from the Bureau of Naval Personnel points out that the former Secretaries wrote their letters without apparent consideration of all the relevant factors they would have considered while acting as Secretary.

Finally, the captains allege that the current Secretary himself acted arbitrarily and capriciously. Section 1552 requires that the Secretary act through a civilian board. That is, the Secretary must base his decision on the record as the board presents it to him. See, e.g., Weiss v. United States, 408 F.2d 416 (Ct. Cl. 1969). There is no indication here that the Secretary acted on any evidence not presented to him by the board. Although the Secre-

tary appears to have not fully met 32 C.F.R. §723.7's requirement that he accompany his action with a statement of reasons, there is a presumption of administrative regularity which the captains have failed to rebut. The Secretary has sufficient evidence before him to have reached the conclusion he did reach. In the absence of contrary evidence, we must and do suppose he adopted the reasons urged upon him in opposition to the promotions. We must therefore affirm the Secretary's decision.

* It does not suffice to say that former Secretaries Warner and Chafee were fully aware of the objections and yet say they would have granted the promotions nevertheless. The fact is the only Secretary who did actually act

in the premises acted in accordance with the objector's position.

* We recognize that the Secretary's failure to specify his reasons for denying promotion, as 32 C.F.R. §723.7 requires, is not trivial and is in error. We do not sanction such actions. We only hold that, in this case, the error is harmless. "We do not demand sterile formality. * * * [I]f the necessary articulation of basis for administrative action can be discerned by reference to clearly relevant sources other than a formal statement of reasons, we will make the reference." Environmental Defense Fund v. Environmental Protection Agency, 465 F.2d 528, 537 (D.C. Cir. 1972). In this case, we are not left "completely in the dark as to the facts and evidence upon which the [Secretary] *** based his judgment."

USV Pharmaceutical Corp. v. Secretary of Health, Education & Welfare, 466 F.2d 455, 462 (D.C. Cir. 1972). Rather we discern from the record, as a whole, that the Secretary had sufficient evidence before him to reach the conclusion he did reach. We must hold, based upon our limited scope of review in the matter, that the Secretary did not act arbitrarily or capriciously.

* The fact is that there can be little evidence less probative than the opinion, however, well informed and however much in good faith, of a former official now out of office, as to what he would have done in office, if only the matter had been placed before him. That it was not placed before him has its own significance. Decisions of public officials are not personal ukases of despots: they are institu-

tional products to which, if important, many minds have contributed.

The Claims Court viewed §5149(b) as delegating an authority to promote which it is itself not granted jurisdiction to exercise and which therefore cannot found a money claim in that court. This was always the view of the former Court of Claims. A recent expression of it is found in Koster v. United States, 685 F.2d 407, 413 (Ct. Cl. 1982), in which earlier cases are cited. It would follow that a refusal to promote on any grounds or none, and in the absence of a clear-cut entitlement to the promotion, could not, standing alone, be the basis of a suit in the Claims Court.

Here, however, we have additional support relied on for the claim. The Secretary acted, not only in view of

§5149(b), but also under 10 U.S.C. §1552. Since this provision authorizes the Secretary, "acting through" a civilian board, to correct any record when necessary to correct an error or remove an injustice, it is certainly arguable and is argued in this case, that not only an error, but an injustice as well, even a refusal to promote, can be so manifest and indubitable that a naked refusal to correct it is contrary to law, or arbitrary and capricious, and possibly therefore the foundation of a money claim in the Claims Court. This question was discussed and considered in the former Court of Claims, but never fully resolved, because a case demanding its resolution was not encountered. Compare opinions of the court and concurring opinion of Nichols, Judge, in Sanders v. United States, 594

F.2d 804 (Ct. Cl. 1979). Rawlins v. United States, 646 F.2d 459 (Ct. Cl. 1980) construes a discrete private law which was read as directing correction of injustice if found, as well as error.

Here we do not find the Secretary's refusal to act under §1552 to be arbitrary and capricious. He had before him, in the board record, letters from former Secretaries stating that they would have promoted the appellants on their retirement if advised it was legally possible. Such evidence is in our view hardly adequate to support a claim of error or injustice. An actual Service Secretary does not act in such matters on his own motion, when in office. He acts on the basis of advice emanating from the bureaus and offices that have cognizance of the matter at

hand. He may reject that advice or, more usually, follow it.

It is not here asking the right question to ask what the Secretary would have done sua sponte. A former Secretary, asked what he would have done, makes an answer that is mere speculation if the question does not postulate what advice he would have received. None of the former Service Secretaries stated that they would have ignored or overridden vehement advice contrary to the promotion by the Bureau having cognizance. Senator, formerly Secretary, Chaffee [sic.] stated in 1980 that he was aware during his term of the kinds of objections the Bureau would have urged. No doubt he was, but this is not the same thing as having the objections actually placed before him.

This is the problem that actually confronted the Service Secretary who by virtue of §1552 finally had to pass on the issue. The Bureau urged that the promotion of any officer without the recommendation of a selection board would be destructive of morale and resented by officers of every rank whose promotions had to be passed on by such a board. The preservation of the merit system of promotion, which every American would wish to see preserved, was apparently at stake in the Bureau's eyes. It appears that at least one other officer has been denied a promotion on retirement for like reasons. The emphatic opposition by the Chief of Naval Personnel (an officer having obvious responsibility in the matter, as head of the Bureau having cognizance) may be criticized as being in effect

opposition to the statute, §5149(b), itself. Any officer who qualified only under that statute is not in his view properly eligible for promotion. This could be taken as opposition to the statute itself. It could be argued that refusal of promotion by the Secretary, if on that ground, would nullify the statute and render its enactment a futile act, thus being arbitrary and capricious. Ordinary selection board promotions are also discretionary, yet it could hardly be urged that a refusal to promote every candidate came within the statutory discretion. In this instance, however, there is nothing to show that Congress intended to require any promotions. It may have intended to leave the Secretary free to refuse promotion for grounds applicable to all, as much as for grounds applicable

to some individuals only. If it did not, it failed to say so. But we are shown nothing persuasive that a reasonable and impartial Secretary and one respectful of the appellants' legal rights, could not in good faith adopt the Bureau's position as his own. If such a Secretary could take the position urged upon him, he was not arbitrary or capricious in concluding there was no injustice to correct, and the grounds for a court's imposing a promotion upon him, narrow as they must be, necessarily do not appear.

II

The captains argue, in the alternative, that the grade upon which their retirement pay ought to be based is the highest pay grade received while on active duty.

Captain Sharratt retired after 20 years of active service under the provisions of 10 U.S.C. §6323. Section 6323 then provided, in relevant part, that:

> (c) Unless entitled to a higher grade, each officer retired under this section shall be retired --
>
> (1) in the highest grade, permanent or temporary, in which he served satisfactorily on active duty as determined by the Secretary of the Navy; or
>
> (2) if the Secretary determines that he did not serve satisfactorily in his highest temporary grade, in the next lower grade in which he has served, but no lower than his permanent grade.

[10 U.S.C. §6323(c)]

Captain Selman was retired pursuant to the provisions of 10 U.S.C. §1201. Section 1201 permitted the Secretary to retire a member of the navy for physical reasons with retired pay computed by 10 U.S.C. §1401. Section 1401 directs that the retired pay

be computed by taking, as a starting point, the [m]onthly basis pay of grade to which member is entitled under [10 U.S.C. §1372] * * *." Section 1372 provides, in relevant part:

> Unless entitled to a higher retired grade under some other provision of law, any member of an armed force who is retired for physical disability under section 1201 or 1204 of this title ***, is entitled to the grade equivalent to the highest of the following:
>
> (1) the grade or rank in which he is serving on the date when his name is placed on the temporary disability retired list.
>
> (2) the highest temporary grade or rank in which he served satisfactorily, as determined by the Secretary of the armed force from which he is retired. ***.

[10 U.S.C. §1372.]

At issue, then, is the meaning of the term "grade" as used in these two statutes. The captains argue that it means "pay grade," e.g., 0-6, 0-7. The United States argues that the term

means "officer grade," e.g., captain or rear admiral. The distinction is commonly of no great significance because pay grades are usually strictly correlated to officer grades. See e.g., 37 U.S.C. §201(a). This officer grade-pay grade correlation is not always precise, however. In Selman I, the Court of Claims held that AJAGs who held the officer grade of captain were entitled to the pay grade of rear admiral (lower half) while serving as AJAGs. (Rear admirals were said to constitute a single officer grade, but those in the upper half outranked those in the lower half. 10 U.S.C. §5501(c). Rear admirals had two pay grades, however, rear admiral (lower half) and rear admiral (upper half). 37 U.S.C. §201(a).) The captains now ask us to extend the ruling in Selman I so that they can

receive retirement benefits based on the higher pay grade.

The term "grade" is extensively used in both Title 10 (Armed Forces) and Title 37 (Pay and Allowances of the Uniformed Services) of the United States Code. The two titles identically define "grade," "rank," and "pay":

> In addition to the definitions in section 1-5 of Title 1, the following definitions apply in this title:
>
> * * *
>
> (18) "Grade" means a step or degree, in a gradual [sic.] scale of office or military rank, that is established and designated as a grade by law or regulation.
>
> (19) "Rank" means the order of precedence among members of the armed forces.
>
> * * *
>
> (27) "Pay" includes basic pay, special pay, retainer pay, incentive pay, retired pay and equivalent pay but does not include allowances.

[10 U.S.C. §101 (18), (19), (27). See also, 37 U.S.C. §101 (15), (16), (21).] The statute is clear: "grade," unmodified, is a step or degree in the gradual [sic.] scale of office or military rank. The concept of "pay grade" is occasionally used in Title 10, but when it is, it is expressly so stated. See e.g., 10 U.S.C. §§555, 815. Although we do not presume to pass conclusive judgment on the meaning of "grade" in its every use in Title 10, we have not been shown any instance of "grade," unmodified, referring to pay grade. We conclude, therefore, that "grade" as used in sections 1401, 1372 [1201] and 6323, and as applied to appellants, refers to "officer grade."

Finally, Powers v. United States, 401 F.2d 813 (Ct. Cl. 1968), even though based on the same statute, can-

not help the captains here. Powers had served as a Deputy and Assistant Judge Advocate General of the Navy. Serving at first in the grade of captain, in 1961 the President appointed Powers to the grade of rear admiral for the time he remained in the position of AJAG. A statutory provision existing at the time entitled deputy AJAGs to the highest rate of their rank. 37 U.S.C. §202(i)(3) (repealed in 1967). Powers, therefore, skipped grade 0-7, rear admiral (lower half), altogether. The issue in the case was whether Powers, who retired in the grade of rear admiral, was entitled to retired pay based on the basic pay of rear admiral (lower half), 0-7, or rear admiral (upper half), 0-8. The Court of Claims based its decision in Powers on an analysis which interpreted "grade" in section

6323 to mean "officer grade." Although Powers has some very broad language favorable to the captains in this case (e.g., "we hold that the statutory scheme clearly bares the Congress' intention that plaintiff's retired pay be based upon the highest rate of pay he received while on active duty," 401 F.2d at 614), the holding is truly a narrow one applicable only to the facts of that case. The court explicitedly pointed out that the claim involved in Powers was novel since it specifically concerned the two pay grades of the officer grade of rear admiral. Powers is applicable, therefore, solely to that situation where there are two pay grades associated with a retired officer's "officer grade."

III

Conclusion

Accordingly, the judgment of the United States Claims Court is affirmed.

AFFIRMED.

PETITIONERS' NOTE

The paragraphs which begin with an * on pages 14a, 15a, and 16a were added by the Order of December 1, 1983 denying the Petition for a Rehearing. By the same Order "1401, 1372", page 28a, line 16 were inserted, "1201" shown in brackets was deleted, and "in line 17", and as applied to appellants," was added.

IN THE UNITED STATES CLAIMS COURT

SOPHIA E. SELMAN, as Executrix of the Estate of RICHARD J. SELMAN, deceased,

and

GEORGE S.H. SHARRATT, JR.

Plaintiffs,

v.

THE UNITED STATES

Defendant.

No. 507-82C

Military pay; pleading and practice; section 5149 promotion upon retirement; jurisdiction; retired pay; meaning of "grade" in retired pay statutes.

Penrose Lucas Albright, Arlington, Virginia, with whom was Mason, Mason & Albright, of counsel, for plaintiffs.

Kathleen A. Flynn, Washington, D. C., with whom were Assistant Attorney

General J. Paul McGrath and Barry J. Plunkett, of counsel, for defendant.

OPINION

KOZINSKI, Chief Judge.

The issue in this military pay case is whether the plaintiffs[1] are entitled to a higher rate of retired pay than they have been receiving from the United States Navy.

FACTS

George S.H. Sharratt, Jr., served as an assistant judge advocate general (AJAG) of the Navy from July 16, 1968, until October 1, 1970, when he retired after 20 years of service. 10 U.S.C.

[1]The plaintiffs in this case are George Sharratt and Richard Selman's widow, Sophia Selman, who took up her husband's claim upon his death. For simplicity, the term "plaintiffs" will generally refer to the officers whose pay is at issue.

§6323 (1959 & Supp. 1982).[2] Richard J. Selman served as an AJAG from August 20, 1968 until May 1, 1972. He then served in another position until July 1, 1973, when he retired with a disability under 10 U.S.C. §1201. While service as AJAGs (and at all other relevant times) both men were captains and were compensated on the basis of an 06 pay grade.

In 1972, Sharratt and Selman brought suit arguing that they should have been paid on the basis of the higher 07 pay grade because 37 U.S.C. §212(1) (1968) entitles AJAGs "to the basic pay of a rear admiral (lower

[2]Some of the code provisions at issue in this case have been amended in ways not applicable to plaintiffs' claims. For ease of reference, all citations are to the United States Code provisions in force at the time of the plaintiffs' retirements, rather than to the public laws originally enacting these provisions.

half)." Rear admirals (lower half) receive basic pay reflecting the 07 pay grade. 37 U.S.C. §201. The Court of Claims upheld plaintiffs' argument. Selman v. United States, 204 Ct. Cl. 675 (1974) (Selman I). The court's ruling raised plaintiffs' active duty pay, but it did not promote them from captains to rear admirals. Id. at 686.

Pursuant to 10 U.S.C. §5149(b) (1964 & Supp. V 1965-69), the Secretary of the Navy is given discretion to promote AJAGs to the rank of rear admiral (lower half) upon their retirement.[3]

[3]This provision must be understood in light of the Senate Armed Forces Committee's imposition of a non-statutory limit on the number of active duty flag officers that the Navy may appoint (the Stennis ceiling). The court in Selman I speculated that this ceiling may have been responsible for plaintiffs' non-promotions despite their excellent records. 204 Ct. Cl. at 678. The ceiling does not apply to promotions upon retirement and has thereby led to enactment of such provisions as section 5149(b). See id. at 684-86.

This discretion was not exercised when Sharratt and Selman retired and consequently they were retired as captains. Their retired pay has thus been computed on the basis of the 06 pay grade assigned to captains rather than the 07 active duty pay awarded them in Selman I.

In 1976 both men petitioned the Board for Correction of Naval Records alleging that the Secretary of the Navy had not been given an opportunity to exercise his discretion pursuant to section 5149 to promote them to rear admirals (lower half) when they re-

tired.[4] In 1981, the board declined to act on plaintiffs' petitions, noting that since there were "no specific criteria to be applied in determining whether an officer is deserving of retirement as a rear admiral pursuant to [section 5149(b)]," it "was unable to conclude that Presidential discretion...should have been exercised." Memoranda from board to Secretary of the Navy, ¶ 3(f) at 3 (May 29, 1981)

[4]Plaintiffs produced letters from individuals who were Secretaries of the Navy at the time of their retirements. Letter from U.S. Senator John Chafee, former Secretary of the Navy, to John E. Corcoran, Jr., Executive Secretary of the Board for Correction of Naval Records (September 13, 1977); letter from John W. Warner, former Secretary of the Navy, to Mr. Corcoran (April 28, 1978); letter from Senator Chafee to Willard D. Pfeiffer, Executive Secretary of the Board for Correction of Naval Records (March 17, 1980)(all attached to complaint). These letters indicate that the authors were not afforded the opportunity to promote plaintiffs pursuant to section 5149 and that they would have done so had the opportunity arisen.

(attached to defendant's motion for judgment on the pleading). The board referred the petitions to the Secretary of the Navy, noting that the "current Secretary...still holds the authority to exercise Presidential discretion under [section 5149(b)] for his determination as to whether or not Petitioner[s] should have been retired in the grade of rear admiral (lower half)." Id. at 6.

John S. Herrington, Assistant Secretary of the Navy, Manpower and Reserve Affairs, summarily denied both petitions on July 16, 1982. Plaintiffs filed suit in this court approximately two months later.

THE CLAIMS

Plaintiffs offer two separate arguments as to why their retired pay should be computed on the basis of an

07 pay grade. First, they argue that since they were paid at 07 while on active duty (pursuant to Selman I), their retired pay should reflect that rate. Alternatively, they argue that the Navy's July 16, 1982, decision not to promote them to rear admirals (lower half) under section 5149(b) was arbitrary and capricious and should be overturned. The arguments are considered in reverse order.

A. The Section 5149 Claim

Section 5149(b) provides that "in the discretion of the President" qualified AJAGs "[may] be retired with the rank and grade of rear admiral (lower half)." It is clear from this language that section 5149(b) appointments are entirely discretionary. Plaintiffs can therefore demonstrate no entitlement to a promotion under this section.

This court's jurisdiction may be invoked only on the basis of a claim for money. Eastport Steamship Corp. v. United States, 178 Ct. Cl. 599, 605 (1967). It has been repeatedly held that where a plaintiff cannot show entitlement to a position, he cannot state a claim for benefits associated with that position and therefore cannot maintain an action in this court. United States v. Testan, 424 U.S. 392 (1976); Koster v. United States, 231 Ct. Cl. ___, 685 F.2d 407, 413 (1982).

It is regrettable that the Secretaries under whom plaintiffs served as AJAGs may not have had the opportunity to exercise their discretion to promote them under section 5149(b). See n.4 supra. However, even if plaintiffs could show that they were entitled to have that discretion exercised (a point

which is far from clear), they could not show that they were entitled to the position itself and to the money that goes with it. In fact, the current Secretary of the Navy, acting through Assistant Secretary Herrington, has exercised his discretion under section 5149(b) and decided not to promote. Since that discretion is wholly unreviewable, there is nothing the court can do to reverse it.[5] No money judgment is therefore possible and the court cannot assert jurisdiction.

B. The Retired Pay Claim

Plaintiffs' alternate claim is that their pensions should be based on

[5]The most that this court could offer by way of relief would be a remand for an explanation of the decision not to promote plaintiffs. Aside from the impropriety of requiring an explanation as to the exercise of Presidential discretion, such remand would not be a money judgment and therefore could not justify an exercise of our jurisdiction. Koster, 685 F.2d at 413.

the 07 pay grade on which their active duty pay was actually computed rather than on the 06 pay grade normally accorded captains.[6] Both men retired under provisions which entitle an officer to retired pay based upon the basic pay of the "grade" in which the officer retired. 10 U.S.C. §§1201, 1401, 6323(e).

At issue is the meaning of the term "grade" in these provisions. Plaintiffs argue that it refers to pay grade, i.e., 06, 07, 08. Defendant argues that the term refers to officer grade, i.e., commander, captain, rear admiral. Normally, the distinction is of no consequence because pay grades are strictly correlated to officer

[6]Defendant has conceded that these claims are continuing ones so that the court has jurisdiction over them for the six years preceding the complaint. See Cosgriff v. United States, 181 Ct. Cl. 730, 734 (1967).

grades. See 37 U.S.C. §201. Thus, commanders are assigned to the 05 pay grade and captains to the 06 pay grade. Rear admirals which constitute a single officer grade,[7] are assigned two pay grades -- 07 and 08 -- corresponding to the designations rear admiral (lower half) and rear admiral (upper half).

Selman I held, however, that this neat correlation between pay grades and officer grades fails when a captain serves as an AJAG, since that position entitles the holder to 07 pay regardless of his rank. That ruling now requires this court to decide whether plaintiffs' retired pay should be computed on the basis of their lower officer grade or higher pay grade.

[7]See 10 U.S.C. §5501(a)(3); Powers v. United States, 185 Ct. Cl. 481, 484 (1968).

The court concludes that defendant is correct in its position that officer grade and not pay grade is the "grade" means in 10 U.S.C. §§1201, 6323. Title 10 (armed forces) defines "grade" in terms of officer grades. See 10 U.S.C. §§101(18), 5501, 5503 (1959 & Supp. 1982). "Pay grades" are defined in title 37 (pay and allowances of the uniformed services).[8] 37 U.S.C. §201. While the concept of pay grades is used from time to time in title 10, see, e.g., 10 U.S.C. §§555, 815 (1975 & Supp. 1982), its use is carefully delineated by reference to the full phrase "pay grade." By contrast, whenever "grade" is used without a qualifying adjective, it invariably refers to what we have been terming as "officer grade."

[8]Title 37 applies to all services, e.g., the Public Health Service, not merely the armed forces established by title 10. See 37 U.S.C. §101(3).

See, e.g., 10 U.S.C. §§1522, 5751.[9] Since sections 1201 and 6323 also appear in title 10, it is appropriate to interpret their terms in accordance with the established usage in that title.

Finally and perhaps most telling, there is Court of Claims precedent indicating that "grade" as used in a retired pay statute, refers to officer grade and not pay grade. In Powers v. United States, 185 Ct. Cl. 481 (1968), the plaintiff was promoted from captain to rear admiral and at the same time

[9]The cited sections are illustrative of the usage in title 10 which establishes that the term grade when unqualified does not refer to pay grade. Section 1522, for example, gives the President discretion to make certain posthumous promotions in grade. Section 1523, however, provides that "[n]o person is entitled to any bonus, gratuity, pay or allowance" because of such posthumous promotion. It is therefore clear that the change in grade in section 1522 cannot refer to a change in pay grade.

was appointed to serve as deputy judge advocate general. Upon promotion from captain, a rear admiral is normally assigned to the pay grade 07, the lower of the two pay grades for rear admirals. However, pursuant to a provision analogous to the one applicable to AJAGs, deputy judge advocate generals are entitled to pay at the highest rate of their rank. 37 U.S.C. §212(i). For rear admirals, this rate is 08. Thus, due to a concurrent promotion and assignment to the deputy JAG position, Powers skipped 07 altogether, going from 06 to 08 pay.

Upon retirement under 10 U.S.C. §6323, Powers received retired pay reflecting an 07 pay grade, the government reasoning that 07 was the basic pay of the grade (rear admiral) in which he had retired. The Court of

Claims reversed on the ground that there was nothing any more basic about the 07 pay than the 08 pay with respect to the grade of rear admiral. 185 Ct. Cl. at 485. Since the grade of rear admiral peculiarly has two pay grades associated with it -- 07 and 08 -- the court thought that computation of Powers' retired pay should be on the basis of the 08 pay he had actually received. Id. at 484-85.

It is clear from the analysis in Powers that the court thought the term "grade" in section 6323 referred to officer grade and not to pay grade.[10] Indeed, Judge Skelton's detailed analysis in that case would have been wholly unnecessary if the

[10]Although Powers interpreted only 10 U.S.C. §6323, the court's assumption that "grade" meant officer grade extends to the similarly worded provisions applicable to a section 1201 retirement.

court had thought that for purposes of computing retired pay "grade" meant "pay grade." It would have been sufficient for the court to state that proposition to dispose of the case. The court's analysis was premised on the assumption that Powers' grade was rear admiral and focused on the question of what basic pay was applicable to that grade under section 6323.[11]

In this case, plaintiffs retired as captains. Only one pay grade, 06, is associated with that officer grade. Under these circumstances, plaintiffs can make no claim under sections 1201 and 6323 for retired pay computed at a different rate. The court therefore

[11]While Powers contains broad language quite helpful to plaintiffs, 185 Ct. Cl. at 483-85, the holding is a narrow one: when there are two pay grades associated with an officer's retired grade, the retired pay must be computed on the basis of the pay actually received. 185 Ct. Cl. at 484-85.

concludes that plaintiffs' retired pay is and has been correctly computed.

CONCLUSION

Plaintiffs' motion for summary judgment is denied. Defendant's motion for judgment on the pleadings is granted. The complaint is dismissed, and costs are awarded to the prevailing party.

IT IS SO ORDERED.

March 4, 1983

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(4) Comptroller General opinion B168691 dtd 14 Jul 75

(5) JAG ltr JAG 131.2:PCW:adg Ser:2708 dtd 30 Mar 76

(6) CHNAVPERS Memo Pers-48-JJD:mjm dtd 20 Jul 78

(7) Sen John Warner ltr to Exec Sec BCNR dtd 28 Apr 78

(8) Sen John H. Chafee ltr to Exec Sec BCNR dtd 17 Mar 80

(9) Subject's counsel's ltr to Exec Sec BCNR dtd 31 Mar 80

(10) Subject's counsel's ltr to Exec Sec BCNR dtd 13 May 80 w/enclosures

(11) JAG ltr JAG 131.2:JMP:pjm Ser:13/5196 dtd 11 Jun 80

(12) Memorandum of Law for Board Members dtd 24 Oct 80

(13) Subject's counsel's ltr to Exec Sec BCNR dtd 10 Feb 81

(14) Proposed Actions in Subject's Case

(15) Officer's Selection Board Jacket

(16) Officer's Fitness Report Record

1. Pursuant to the provisions of reference (a), Subject, hereinafter, referred to as Petitioner, filed written application enclosure (1), with this Board requesting, in effect, that his naval record be corrected to show the following:

a. That on 1 July 1973, Petitioner, having served satisfactorily for at least twelve months as an Assistant Judge Advocate General of the Navy under reference (b), and while serving satisfactorily in the grade of captain after completion of that service, was retired (placed on the Temporary Dis-

ability Retired List) in the discretion of the President pursuant to reference (b) with the rank and grade of rear admiral (lower half) and with entitlement to the retired pay of that rank and grade; and

b. That Petitioner is entitled to have his retired pay commencing on 1 July 1973 computed on the basis of that of a rear admiral (lower half).

Petitioner further requested that he be paid the additional monies (including the interim cost of living increases) to which he would be entitled under the foregoing corrective actions.

2. The Board commenced its review of Petitioner's allegations of error and injustice on 19 March 1980, holding additional meetings on 28 March 1980 and 25 September 1980, and completed its deliberation on 6 April 1981. Pur-

suant to its regulations, the Board determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Prior to filing his application with this Board, Petitioner exhausted all administrative remedies afforded him under existing law and regulations within the Department of the Navy.

b. On 20 August 1968 Petitioner reported for duty as Assistant Judge Advocate General (AJAG) for Military

Law. He served in this capacity until 1 May 1972. Due to a nonstatutory limit on the number of naval flag officers, imposed by the Senate Armed Forces Committee (referred to as the "Stennis ceiling"), Petition was not formally detailed as an AJAG under reference (b). It was the Navy's understanding that had he been so detailed, his appointment to the grade of rear admiral (lower half) would have been mandatory. During the period he served as an AJAG, petitioner was paid as a captain. On 29 June 1972 he filed an administrative claim requesting the difference in pay and allowances for such service as an AJAG in the grade of captain and that to which a rear admiral (lower half) would be entitled, based on 37 USC 202(1). On 25 July 1972 the Navy denied this request,

based upon the Comptroller General opinion at enclosure (2). Such opinion held that only officers "detailed" as AJAG's and bearing the qualification of rear admirals were eliglble for the higher pay. On 3 June 1974 the U.S. Court of Claims decided Case Number 421-72, enclosure (3), in favor of Petitioner, holding that section 202 of Title 37 made "mandatory" pay to personnel filling an AJAG billet designated in reference (b) and, therefore, that Petitioner was entitled to back pay and allowances. In light of the Court of Claims ruling, the Comptroller General revised his position, as reflected in the opinion at enclosure (4).

c. Petitioner was retired on 1 July 1973 in the grade of captain. In his case, the Secretary of the Navy, John W. Warner, did not exercise,

either affirmatively or negatively, the authority duly delegated to him to exercise Presidential discretion under reference (b).

d. On 30 March 1976 the Judge Advocate General (JAG) commented, in correspondence attached as enclosure (5), to the effect that the authority does exist for this Board to recommend corrective action. The JAG concluded that such determination should be premised on the following: (1) that the Secretary of the Navy has not been provided an opportunity to exercise knowingly his delegated discretion to retire Petitioner in the grade of rear admiral, and (2), that there was a substantial basis to exercise that discretion in Petitioner's favor.

e. On 20 July 1978 the Chief of Naval Personnel (CNP) commented, in

correspondence attached as enclosure (6), to the effect that Petitioner's application should not be granted. CNP noted that former Secretary of the Navy Warner indicated, in his letter of 28 April 1978, enclosure (7), that had he been aware that he, as Secretary of the Navy, acting for the President under the provisions of reference (b), could have placed an officer in the situation of Petitioner on the retired list in the rank and grade of rear admiral, he would have done so in Petitioner's case. CNP concluded that former Secretary Warner's who was Secretary of the Navy when Petitioner was retired, would have considered all of the "relevant factors" including certain points mitigating against Petitioner's retirement in the grade of rear admiral and not just the facts of Petitioner's case.

f. In its first review of Petitioner's case on 19 March 1980, the Board found no basis for the conclusion that Presidential discretion under reference (b) must be exercised, favorably or unfavorably, in every case, regardless of its merits. Furthermore, the Board found that there are no specific criteria to be applied in determining whether an officer is deserving of retirement as a rear admiral pursuant to reference (b). In the absence of such criteria the Board was unable to conclude that Presidential discretion under reference (b) should have been exercised in Petitioner's case.

g. After the initial consideration of the case, the Board received enclosure (8), a letter dated 17 March 1980 from former Secretary Chafee, Senator Warner's immediate predecessor

as Secretary of the Navy. In view of that letter, the Board reconsidered the case on 28 March 1980 and adhered to its previous position. On 31 March 1980, Petitioner's counsel forwarded additional documentation, contained at enclosure (9), some of which was not previously available to the Board. Counsel considered Senator Chafee's letter at enclosure (8) to be pivotal to Petitioner's case. In this letter, the former Secretary of the Navy indicated that he had given careful consideration to all of the various "relevant factors" which CNP outlined in enclosure (6) and in his briefing memorandum in the case of another retired officer who had served as an AJAG. Senator Chafee stated that he still adhered to his position, as expressed in his letter of 13 September 1977 (copy at

Tab A to enclosure (9)), that had Petitioner retired while he was Secretary of the Navy, he would have acted favorably on Petitioner's case had he known of his authority under reference (b). Counsel noted former Secretary Warner's comment that he would have given Petitioner's case "fair consideration" and concluded that there was no basis for a finding that Senator Warner would have acted differently in Petitioner's case than his predecessor as Secretary of the Navy would have acted.

h. By enclosure (10), dated 13 May 1980, Petitioner's counsel responded to the issue of whether or not the Comptroller General opinion at enclosure (2) precluded favorable action in this case.

i. In the correspondence of 11 June 1980 attached as enclosure (11), JAG reaffirmed the position set forth in enclosure (5). Paragraph 2c of enclosure (11) is a summation of the JAG position. It concludes as follows: "...whether or not the omissions of the respective former Secretaries of the Navy constitute error or injustices which warrant such correction is a determination within the cognizance of the Board for Correction of Naval Records and the Secretary of the Navy, upon which the Judge Advocate General defers."

j. On 25 September 1980 counsel for Petitioner appeared before the Board and made a brief oral summarization of the applicable laws and the sequence of events surrounding this case. Counsel maintained that for Peti-

tioner to be eligible to be retired in the discretion of the President pursuant to reference (b) with the rank, grade and pay of a rear admiral (lower half), he need merely to have served in a statutory AJAG billet. Counsel concluded that detailing, as that term is used in reference (b), is not a prerequisite to such eligibility. The Board accepted counsel's position that the Secretary of the Navy did not have an opportunity to exercise Presidential discretion in Petitioner's case. However, the Board agreed to consider staff input as to whether or not Petitioner was legally eligible to be retired in the discretion of the President with the rank, grade and pay of a rear admiral (lower half).

k. A staff Memorandum of Law dated 24 October 1980, enclosure (12),

was provided to the Board and Petitioner's counsel. This memorandum concluded that a formal detail to duty as an AJAG was necessary in order for an officer to receive consideration for retirement in the grade of rear admiral (lower half) under reference (b). In that connection, the memorandum quoted language from the Court of Claims opinion at enclosure (3) to the effect that formal detailing was a "requirement" under reference (b). The memorandum further concluded that Petitioner could not properly have been retired in the grade of rear admiral (lower half) under reference (b) because he never held that grade before he retired. In reaching the latter conclusion, the Board cited the following language from the Comptroller General opinion at enclosure (2):

...we have found nothing in the law or its legislative history of any intent to authorize retirement for an Assistant Judge Advocate General of the Navy in a grade higher than the one in which he served on active duty or to authorize retired pay based on such a higher grade.

1. On 10 February 1981 counsel for Petitioner submitted enclosure (13), his comments on the Staff Memorandum of Law. Counsel reiterated his position that by virtue of the fact that Petitioner was assigned to a statutory AJAG billet, he was entitled to be considered under reference (b) for retirement in the grade of rear admiral (lower half) with the pay of that grade.

CONCLUSION:

Despite the fact that Petitioner was not formally detailed as an AJAG under reference (b), and the further fact that he never held the grade of rear admiral (lower half) before he was retired, the Board is persuaded that he was eligible to be the subject of Presidential discretion under reference (b). In that connection, the Board substantially concurs with the analysis of Petitioner's counsel at enclosure (13).

Upon review and consideration of all the evidence of record, the Board finds the existence of an error and injustice in Petitioner's case, in that the Secretary of the Navy at the time of Petitioner's retirement was not afforded an opportunity to exercise knowingly the authority delegated to him to exercise Presidential discretion under reference (b). In this regard

the Board takes particular note of the relevant contents of the Judge Advocate General's opinion at enclosure (5).

The Board concludes that the most appropriate remedial action is the referral of Petitioner's case to the current Secretary of the Navy, who still holds the authority to exercise Presidential discretion under reference (b), for his determination as to whether or not Petitioner should have been retired in the grade of rear admiral (lower half) and, in the event of an affirmative determination, correction of Petitioner's record to reflect that he was so retired. Notwithstanding the comments of the Judge Advocate General to the contrary, the Board considers that it is not its proper place to speculate as to how the Secretary would have exercised Presidential dis-

cretion under reference (b) in Petitioner's case, had it been exercised at the time of Petitioner's retirement.

In view of the foregoing, the Board recommends the following corrective action.

RECOMMENDATION:

a. That Presidential discretion under reference (b) be exercised in Petitioner's case nunc pro tunc.

b. That one of the two proposed actions attached hereto as Tabs A and B to enclosure (14) be approved.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

- s -

ROBERT D. ZSALMAN JONATHAN S. RUSKIN

Recorder Acting Recorder

5. The foregoing action of the Board is submitted for your review and action.

- s -

SAMUEL SCHULMAN

Reviewed and approved:

Approved 16 July 1982. See executed action memorandum dated 16 July 1982, enclosure (14), Tab A.

- s -

John S. Herrington

Assistant Secretary of the Navy

(Manpower and Reserve Affairs)

DEPARTMENT OF THE NAVY
Office of the Secretary
Washington, D. C. 20350

MEMORANDUM FOR THE CHIEF OF NAVAL PERSONNEL

Subj: SELMAN, Richard J., CAPT, JAGC, USN (Ret/Deceased), 480-16-6545/2503; Review of naval record

Ref: (a) Approved BCNR Report in Subject's Case
(b) Title 10 USC 5149(b)

1. In accordance with reference (a), I have reviewed the merits of Subject's case, and have determined the Subject should have been retired in the grade of rear admiral (lower half) under reference (b).

2. Accordingly, the following corrective action is directed:

a. That Subject's record be corrected to reflect that he was retired in the grade of rear admiral (lower half) under reference (b).

b. That a copy of this memorandum, together with a copy of reference (a) less enclosures, which will be provided by the Board for Correction of Naval Records (BCNR), be filed at an appropriate location in Subject's records.

c. That any material that it becomes necessary to remove in order to carry out this corrective action be forwarded to BCNR for filing in a confidential file maintained for such purpose.

d. That any material or entries inconsistent with this corrective action be corrected, removed or completely expunged from Subject's record and

that no such material or entries be added to his record in the future.

FOR THE PRESIDENT

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DEPARTMENT OF THE NAVY
Office of the Secretary
Washington, D. C. 20350

16 July 1982

MEMORANDUM FOR EXECUTIVE DIRECTOR,
BOARD FOR CORRECTION OF NAVAL RECORDS

Subj: SELMAN, Richard J., CAPT, JAGC, USN (Ret/Deceased), 480-16-6545/2503; Review of Naval Record

Ref: (a) Approved BCNR Report in Subject's Case
(b) Title 10 USC 5149 (b)

In accordance with reference (a), I have reviewed the merits of Subject's case, and have concluded that correction of his record to show that he was retired in the grade of rear admiral (lower half) under reference (b) is not warranted.

FOR THE PRESIDENT

- s -

John S. Herrington

Assistant Secretary of the Navy

(Manpower and Reserve Affairs)

DEPARTMENT OF THE NAVY

Board For Correction of Naval Records

Washington, D. C. 20370

KMH:ce/R

688-76

29 May 1981

From: Chairman, Board for Correction of Naval Records

To: Secretary of the Navy

Subj: SHARRATT, George S. H., CAPT, JAGC, USN (Ret), 486-01-5019; Review of naval record

Ref: (a) Title 10 U.S.C. 1552

(b) Title 10 U.S.C. 5149 (b)

Encl: (1) DD Form 149 w/attachments

(2) Comptroller General opinion B168691 dtd 13 Jul 70

(3) U.S. Court of Claims Case No. 421-73 dtd 19 Jun 74

(4) Comptroller General opinion B168691 dtd 14 Jul 75

(5) JAG ltr JAG 131.2:PCW:adg Ser:2708 dtd 30 Mar 76

(6) CHNAVPERS Memo Pers-48-JJD:mjm dtd 20 Jul 78

(7) Sen John H. Chafee ltr to Exec Sec BCNR dtd 13 Sep 77

(8) Sen John H. Chafee ltr to Exec Sec BCNR dtd 17 Mar 80

(9) Subject's counsel's ltr to Exec Sec BCNR dtd 31 Mar 80

(10) Subject's counsel's ltr to Exec Sec BCNR dtd 13 May 80 w/enclosures

(11) JAG ltr JAG 131.2:JMP:pjm Ser:13/5196 dtd 11 Jun 80

(12) Memorandum of Law for Board Members dtd 24 Oct 80

(13) Subject's counsel's ltr to Exec Sec BCNR dtd 10 Feb 81

(14) Proposed Actions in Subject's Case

(15) Officer's Selection Board Jacket

(16) Officer's Fitness Report Record

1. Pursuant to the provisions of reference (a), Subject, hereinafter, referred to as Petitioner, filed written application enclosure (1), with this Board requesting, in effect, that his naval record be corrected to show the following:

a. That on 1 October 1970, Petitioner, while serving satisfactorily as an Assistant Judge Advocate General of the Navy under reference (b), was retired in the discretion of the President pursuant to reference (b) with the rank and grade of rear admiral (lower half) and with entitlement to the retired pay of that rank and grade; and

b. That Petitioner is entitled to have his retired pay commencing on 1 October 1970 computed on the basis of that of a rear admiral (lower half). Petitioner further requested that he be paid the additional monies (including the interim cost of living increases) to which he would be entitled under the foregoing corrective actions.

2. The Board commenced its review of Petitioner's allegations of error and injustice on 19 March 1980, holding additional meetings on 28 March 1980 and 25 September 1980, and completed its deliberation on 6 April 1981. Pursuant to its regulations, the Board determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval re-

cords, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Prior to filing his application with this Board, Petitioner exhausted all administrative remedies afforded him under existing law and regulations within the Department of the Navy.

b. On 16 July 1968 Petitioner reported for duty as Assistant Judge Advocate General (AJAG) for Civil Law. He served in this capacity until 1 October 1970. Due to a nonstatutory limit on the number of naval flag officers, imposed by the Senate Armed Forces Committee (referred to as the "Stennis ceiling"), Petitioner was not

formally detailed as an AJAG under reference (b). It was the Navy's understanding that had he been so detailed, his appointment to the grade of rear admiral (lower half) would have been mandatory. During the period he served as an AJAG, Petitioner was paid as a captain. On 29 June 1972 he filed an administrative claim requesting the difference in pay and allowances for such service as an AJAG in the grade of captain and that to which a rear admiral (lower half) would be entitled, based on 37 USC 202(1). On 25 July 1972 the Navy denied this request, based upon the Comptroller General opinion at enclosure (2). Such opinion held that only officers "detailed" as AJAG's and bearing the qualification of rear admirals were eligible for the higher pay. On 3 June 1974 the U.S.

Court of Claims decided Case Number 421-72, enclosure (3), in favor of Petitioner, holding that section 202 of Title 37 made "mandatory" pay to personnel filling an AJAG billet designated in reference (b) and, therefore, that Petitioner was entitled to back pay and allowances. In light of the Court of Claims ruling, the Comptroller General revised his position, as reflected in the opinion at enclosure (4).

c. Petitioner was retired on 1 October 1970 in the grade of captain. In his case, the Secretary of the Navy, John H. Chafee, did not exercise, either affirmatively or negatively, the authority duly delegated to him to exercise Presidential discretion under reference (b).

d. On 30 March 1976 the Judge Advocate General (JAG) commented, in

correspondence attached as enclosure (5), to the effect that the authority does exist for this Board to recommend corrective action. The JAG concluded that such determination should be premised on the following: (1) that the Secretary of the Navy has not been provided an opportunity to exercise knowingly his delegated discretion to retire Petitioner in the grade of rear admiral, and (2), that there was a substantial basis to exercise that discretion in Petitioner's favor.

e. On 20 July 1978 the Chief of Naval Personnel (CNP) commented, in correspondence attached as enclosure (6), to the effect that Petitioner's application should not be granted. CNP noted that former Secretary of the Navy Chafee indicated, in his letter of 13 September 1977, enclosure (7), that had

he been aware that he, as Secretary of the Navy, acting for the President under the provisions of reference (b), could have placed an officer in the situation of Petitioner on the retired list in the rank and grade of rear admiral, he would have done so in Petitioner's case. CNP concluded that former Secretary Chafee's statement was made without consideration of all the relevant factors which he would have been required to weigh as Secretary of the Navy.

f. In its first review of Petitioner's case on 19 March 1980, the Board found no basis for the conclusion that Presidential discretion under reference (b) must be exercised, favorably or unfavorably, in every case, regardless of its merits. Furthermore, the Board found that there are no speci-

fic criteria to be applied in determining whether an officer is deserving of retirement as a rear admiral pursuant to reference (b). In the absence of such criteria the Board was unable to conclude that Presidential discretion under reference (b) should have been exercised in Petitioner's case.

g. After the initial consideration of the case, the Board received enclosure (8), a letter dated 17 March 1980 from former Secretary Chafee. In view of that letter, the Board reconsidered the case on 28 March 1980 and adhered to its previous position. On 31 March 1980, Petitioner's counsel forwarded additional documentation, contained at enclosure (9), some of which was not previously available to the Board. Counsel considered former Secretary Chafee's letter at enclosure (8)

to be pivotal to Petitioner's case. In this letter, he indicated that he had given careful consideration to all of the various "relevant factors" which CNP outlined in enclosure (6) and in the CNP briefing memorandum in the case of another retired officer who had served as an AJAG. He stated that he still adhered to his position, as expressed in his letter of 13 September 1977 (enclosure (7)), that he would have acted favorably on Petitioner's case, had he known of his authority under reference (b).

h. By enclosure (10), dated 13 May 1980, Petitioner's counsel responded to the issue of whether or not the Comptroller General opinion at enclosure (2) precluded favorable action in this case.

i. In the correspondence of 11 June 1980 attached as enclosure (11), JAG reaffirmed the position set forth in enclosure (5). Paragraph 2c of enclosure (11) is a summation of the JAG position. It concludes as follows: "...whether or not the omissions of the respective former Secretaries of the Navy constitute error or injustices which warrant such correction is a determination within the cognizance of the Board for Correction of Naval Records and the Secretary of the Navy, upon which the Judge Advocate General defers."

j. On 25 September 1980 counsel for Petitioner appeared before the Board and made a brief oral summarization of the applicable laws and the sequence of events surrounding this case. Counsel maintained that for Peti-

tioner to be eligible to be retired in the discretion of the President pursuant to reference (b) with the rank, grade and pay of a rear admiral (lower half), he need merely to have served in a statutory AJAG billet. Counsel concluded that detailing, as that term is used in reference (b), is not a prerequisite to such eligibility. The Board accepted counsel's position that the Secretary of the Navy did not have an opportunity to exercise Presidential discretion in Petitioner's case. However, the Board agreed to consider staff input as to whether or not Petitioner was legally eligible to be retired in the discretion of the President with the rank, grade and pay of a rear admiral (lower half).

k. A staff Memorandum of Law dated 24 October 1980, enclosure (12),

was provided to the Board and Petitioner's counsel. This memorandum concluded that a formal detail to duty as an AJAG was necessary in order for an officer to receive consideration for retirement in the grade of rear admiral (lower half) under reference (b). In that connection, the memorandum quoted language from the Court of Claims opinion at enclosure (3) to the effect that formal detailing was a "requirement" under reference (b). The memorandum further concluded that Petitioner could not properly have been retired in the grade of rear admiral (lower half) under reference (b) because he never held that grade before he retired. In reaching the latter conclusion, the Board cited the following language from the Comptroller General opinion at enclosure (2):

...we have found nothing in the law or its legislative history of any intent to authorize retirement for an Assistant Judge Advocate General of the Navy in a grade higher than the one in which he served on active duty or to authorize retired pay based on such a higher grade.

1. On 10 February 1981 counsel for Petitioner submitted enclosure (13), his comments on the Staff Memorandum of Law. Counsel reiterated his position that by virtue of the fact that Petitioner was assigned to a statutory AJAG billet, he was entitled to be considered under reference (b) for retirement in the grade of rear admiral (lower half) with the pay of that grade.

CONCLUSION:

Despite the fact that Petitioner was not formally detailed as an AJAG under reference (b), and the further fact that he never held the grade of rear admiral (lower half) before he was retired, the Board is persuaded that he was eligible to be the subject of Presidential discretion under reference (b). In that connection, the Board substantially concurs with the analysis of Petitioner's counsel at enclosure (13).

Upon review and consideration of all the evidence of record, the Board finds the existence of an error and injustice in Petitioner's case, in that the Secretary of the Navy at the time of Petitioner's retirement was not afforded an opportunity to exercise knowingly the authority delegated to him to exercise Presidential discretion under reference (b). In this regard

the Board takes particular note of the relevant contents of the Judge Advocate General's opinion at enclosure (5).

The Board concludes that the most appropriate remedial action is the referral of Petitioner's case to the current Secretary of the Navy, who still holds the authority to exercise Presidential discretion under reference (b), for his determination as to whether or not Petitioner should have been retired in the grade of rear admiral (lower half) and, in the event of an affirmative determination, correction of Petitioner's record to reflect that he was so retired. Notwithstanding the comments of the Judge Advocate General to the contrary, the Board considers that it is not its proper place to speculate as to how the Secretary would have exercised Presidential discretion

under reference (b) in Petitioner's case, had it been exercised at the time of Petitioner's retirement.

In view of the foregoing, the Board recommends the following corrective action.

RECOMMENDATION:

a. That Presidential discretion under reference (b) be exercised in Petitioner's case nunc pro tunc.

b. That one of the two proposed actions attached hereto as Tabs A and B to enclosure (14) be approved.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

- s -

ROBERT D. ZSALMAN JONATHAN S. RUSKIN

Recorder Acting Recorder

5. The foregoing action of the Board is submitted for your review and action.

- s -

SAMUEL SCHULMAN

Reviewed and approved:

Approved 16 July 1982. See executed action memorandum dated 16 July 1982, enclosure (14), Tab A.

- s -

John S. Herrington

Assistant Secretary of the Navy

(Manpower and Reserve Affairs)

DEPARTMENT OF THE NAVY
Office of the Secretary
Washington, D. C. 20350

MEMORANDUM FOR THE CHIEF OF NAVAL PERSONNEL

Subj: SHARRATT, George S. H., CAPT, USN (Ret), 486-01-5019/2503; Review of naval record

Ref: (a) Approved BCNR Report in Subject's Case
(b) Title 10 USC 5149(b)

1. In accordance with reference (a), I have reviewed the merits of Subject's case, and have determined the Subject should have been retired in the grade of rear admiral (lower half) under reference (b).

2. Accordingly, the following corrective action is directed:

a. That Subject's record be corrected to reflect that he was retired

in the grade of rear admiral (lower half) under reference (b).

b. That a copy of this memorandum, together with a copy of reference (a) less enclosures, which will be provided by the Board for Correction of Naval Records (BCNR), be filed at an appropriate location in Subject's records.

c. That any material that it becomes necessary to remove in order to carry out this corrective action be forwarded to BCNR for filing in a confidential file maintained for such purpose.

d. That any material or entries inconsistent with this corrective action be corrected, removed or completely expunged from Subject's record and that no such material or entries be added to his record in the future.

FOR THE PRESIDENT

DEPARTMENT OF THE NAVY
Office of the Secretary
Washington, D. C. 20350

16 July 1982

MEMORANDUM FOR EXECUTIVE DIRECTOR,
BOARD FOR CORRECTION OF NAVAL RECORDS

Subj: SHARRATT, George S. H., CAPT, USN (Ret) 486-01-5019/2503; Review of Naval Record

Ref: (a) Approved BCNR Report in Subject's Case
(b) Title 10 USC 5149 (b)

In accordance with reference (a), I have reviewed the merits of Subject's case, and have concluded that correction of his record to show that he was retired in the grade of rear admiral (lower half) under reference (b) is not warranted.

FOR THE PRESIDENT

- s -

John S. Herrington
Assistant Secretary of the
Navy
(Manpower and Reserve
Affairs)

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SOPHIA E. SELMAN, as Executrix of the Estate of RICHARD J. SELMAN, Deceased,
and
SHIRLEY MARIE SHARRATT, as Executrix of the Estate of GEORGE S.H. SHARRATT, JR., Deceased,

Appellants,

v. Appeal No. 83-840

THE UNITED STATES,

Appellee.

Before DAVIS, Circuit Judge, NICHOLS, Senior Circuit Judge, and MILLER, Circuit Judge.

O R D E R

On Appellants' petition for rehearing, IT IS HEREBY ORDERED that the opinion be amended by:

1. Inserting after the full paragraph on page 8 the following new paragraphs:

It does not suffice to say that former Secretaries Warner and Chafee were fully aware of the objec-

tions and yet say they would have granted the promotions nevertheless. The fact is the only Secretary who did actually act in the premises acted in accordance with the objector's position.

We recognize that the Secretary's failure to specify his reasons for denying promotion, as 32 C.F.R. §723.7 requires, is not trivial and is in error. We do not sanction such actions. We only hold that, in this case, the error is harmless. "We do not demand sterile formality.* * *[I]f the necessary articulation of basis for administrative action can be discerned by reference to clearly relevant sources other than a formal statement of reasons, we will make the reference." Environmental Defense Fund v. Environmental Protection Agency, 465 F.2d 528,

537 (D.C. Cir. 1972). In this case, we are not left "completely in the dark s to the facts and evidence upon which the [Secretary] * * * based his judgment." USV Pharmaceutical Corp. v. Secretary of Health, Education & Welfare, 466 F.2d 455, 462 (D.C. Cir. 1972). Rather, we discern from the record, as a whole, that the Secretary had sufficient evidence before him to reach the conclusion he did reach. We must hold, based upon our limited scope of review in the matter, that the Secretary did not act arbitrarily or capriciously.

The fact is that there can be little evidence less probative than the opinion, however well informed and however much in good faith, of a former official now out of office, as to what he would have done in office, if only

the matter had been placed before him. That it was not placed before him ha its own significance. Decisions of public officials are not personal ukases of despots: they are institutional products to which, if important, many minds have contributed.

2. Changing the last sentence of the first paragraph on page 15 to read --

"We conclude, therefore, that "grade" as used in sections 1401, 1372, and 6323, and as applied to appellants, refers to "officer grade."

3. In all other respects the petition is denied, and the opinion referred to is reaffirmed.

FOR THE COURT

Philip Nichols, Jr.

Senior Circuit Judge

Nov 30 1983

Date

UNITED STATES COURT OF APPEALS FOR THE

FEDERAL CIRCUIT

SOPHIA E. SELMAN, as Executrix of the Estate of RICHARD J. SELMAN, Deceased and SHIRLEY MARIE SHARRATT, as Executrix of the Estate of GEORGE S.H. SHARRATT, JR., Deceased,	No.83-840 Clms. Ct. No. 507-82C

Appellants,

v.

THE UNITED STATES

Appellees.

JUDGMENT

ON APPEAL from the U.S. Claims Court

This CAUSE having been heard and considered, it is ORDERED AND ADJUDGED: AFFIRMED

Dated: October 28, 1983
ENTERED BY ORDER OF THE COURT

George E. Hutchinson, Clerk
- s -

Clerk

Appellant's Petition for Rehearing, Denied, except to the extent the the opinion is amended changing certain language therein and

adding other language,
December 1, 1983

ISSUED AS A MANDATE: December 9, 1983
COSTS: Against, Appellants
PRINTING----------$28.16
TOTAL-------------$28.16

10 U.S.C. §101 provides in pertinent part:

Definitions:

In addition to the definitions in sections 1-5 of title 1, the following definitions apply in this title:

* * *

(18) "Grade" means a step or degree, in a graduated scale of office or military rank, that is established and designated as a grade by law or regulation.

* * *

10 U.S.C. §277 provides:

Laws applying to both Regulars and Reserves shall be administered without discrimination --

(1) among Regulars;

(2) among Reserves; and

(3) between Regulars and Reserves.

10 U.S.C. §1372 provides in pertinent part:

Unless entitled to a higher retired grade under some other provision of law, any member of an armed force who is retired for physical disability under section 1201 or 1204 of this title, or whose name is placed on the temporary disability retired list under section 1202 or 1205 of this title is entitled to the grade equivalent to the highest of the following:

(1) The grade or rank in which he is serving on the date when his name is placed on the temporary disability retired list or, if his name was not carried on that list, on the date when he is retired.

(2) The highest temporary grade or rank in which he served satisfactorily, as determined by the Secretary of the armed force from which he is retired.

* * *

10 U.S.C. §1401 provides in pertinent part:

The monthly retired pay of a person entitled thereto under this subtitle is computed according to the following table.

Formula No. 1

For Sections: 1201

1204

Column 1: Monthly basis pay[1] of grade to which member is

[1]Compute at rates applicable on date of retirement or date when member's name was placed on temporary disability retired list, as the case may be.

entitled under section 1372 or to which he was entitled on day before retirement or placement on temporary disability retired list, whichever is higher.

Column 2: (Multiply by):
As member elects:
(1) 2 1/2% of years of service credited to him under section 1208, or
(2) the percentage of disability on date when retired.

Column 3:

Column 4: Excess of 75% of pay upon which compensation is based.

Formula No. 2

For Sections 1202

1205

Column 1: Monthly basic pay[1] of grade to which member is entitled under section 1372 or to which he was entitled on day before retirement or placement on temporary disability retired list, whichever is higher.

Column 2: (Multiply by):

As member elects:

(1) 2 1/2% of years of service credited to him under section 1208, or

(2) the percentage of disability on date when his name was placed on temporary disability retired list.

Column 3: Amount necessary to increase product of columns 1 and 2 to 50% of pay upon which computation is based.

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Column 4: Excess over 75% of pay upon which computation is based.

* * *

10 U.S.C. §1552 provides in pertinent part:

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of Transportation may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclu-

sive on all officers of the United States.

* * *

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reap-

point him to, the grade to which payments under this section relate.

* * *

10 U.S.C. §5149(b) (1976) provides:

(b) An officer of the Judge Advocate General's Corps who has the qualifications prescribed for the Judge Advocate General in section 5148(b) of this title may be detailed as Assistant Judge Advocate General of the Navy. While so serving he is entitled to the rank and grade of rear admiral (lower half), unless entitled to a higher rank or grade under another provision of law. An officer who is retired while serving as Assistant Judge Advocate General of the Navy under this subsection or who, after serving at least twelve months as Assistant Judge Advocate General of the Navy, is retired after completion of

that service while serving in a lower rank or grade, may, in the discretion of the President, be retired with the rank and grade of rear admiral (lower half). If he is retired as a rear admiral, he is entitled to retired pay in the lower half of that grade, unless entitled to higher pay under another provision of law.

10 U.S.C. §6323 (1976) provides in pertinent part:

(a) An officer of the Navy or the Marine Corps who applies for retirement after completing more than 20 years of active service, of which at least 10 years was service as a commissioned officer, may, in the discretion of the President, be retired on the first day of any month designated by the President.

* * *

(e) Unless otherwise entitled to higher pay, an officer retired under this section is entitled to retired pay at the rate of 2 1/2 percent of the basic pay to which he would be entitled if serving on active duty in the grade in which retired multiplied by the number of years of service that may be credited to him under section 1405 of this title, but the retired pay may not be more than 75 percent of the basic pay upon which the computation of retired pay is based.

* * *

32 C.F.R. §723.7 and 723.3(3)(5) provide:

§723.7 Action by the Secretary

The record of proceedings of the Board, except in cases finalized by the Board under the authority delegated in paragraph (e) of §723.6 or those denied by the Board without a hearing, will be forwarded to the Secretary of the Navy who will direct such action in each case as he determines to be appropriate, which may include the return of the record to the board for further consideration when deemed necessary. Those cases returned for further consideration shall be accompanied by a brief statement setting out the reasons for such action and any specific instructions. If the Secretary's decision is to deny relief, such decision shall be in writing and, unless he expressly adopts in whole or in part the findings, conclusions and recommendation of the Board, shall include a brief state-

ment of the grounds for denial. See paragraph (e)(5) of §723.3.

* * *

§723.3(e)(5) The brief statement of the grounds for denial shall include the reasons for the determination that relief should not be granted, including the applicant's claim of constitutional, statutory and/or regulatory violations that were rejected, together with all the essential facts upon which the denial is based, including, if applicable, factors required by regulation to be considered for determination of the character of and reasons for a discharge. Attached to the statement shall be any advisory staff opinion considered by the Board which is not fully set out in the statement, together with any minority opinion.

No. 83-1438

In the Supreme Court of the United States

OCTOBER TERM, 1983

SOPHIA E. SELMAN, EXECUTRIX OF THE ESTATE OF RICHARD J. SELMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
ELOISE E. DAVIES
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioners' decedents, two retired Navy officers who held the rank of captain but were compensated for their active service at the higher rate generally payable to rear admirals (lower half), were entitled to the higher rate of pay upon their retirement.

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TABLE OF AUTHORITIES

Cases:

Statutes and regulations:

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1438

SOPHIA E. SELMAN, EXECUTRIX OF THE ESTATE OF RICHARD J. SELMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 723 F.2d 877. The opinion of the United States Claims Court (Pet. App. 32a-49a) is reported at 1 Cl. Ct. 702. The reports of the Board for Correction of Naval Records (Pet. App. 50a-98a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1983 (Pet. App. 104a-105a). A petition for rehearing was denied on December 1, 1983

(Pet. App. 99a-103a, 105a).[1] The petition for a writ of certiorari was filed on February 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. George S.H. Sharratt, Jr. served as an assistant judge advocate general (AJAG) in the United States Navy from July 16, 1968, until October 1, 1970, when he retired after 20 years of service. Richard J. Selman served as an AJAG from August 20, 1968, until May 1, 1972; he then served in another position until he retired with a disability on July 1, 1973.[2] During their service as AJAGs, both men held the rank of captain and were compensated on the basis of an 06 pay grade. Pet. App. 2a-3a, 33a-34a.

In 1972, petitioners brought suit in the former Court of Claims, contending that they should have been paid on the basis of an 07 pay grade pursuant to 37 U.S.C. (1976 ed.) 202(*l*). Section 202(*l*) entitled AJAGs "to the basic pay of a rear admiral (lower half)"; rear admirals (lower half) are compensated at the 07 pay grade level. The Court of Claims ruled in petitioners' favor. *Selman* v. *United States* (*Selman I*), 498 F.2d 1354 (1974). Although

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[1] By order entered December 1, 1983, the court of appeals amended its prior opinion by the substitution of certain language and the addition of other language, and denied the rehearing petition in all other respects. Pet. App. 99a-102a, 104a-105a.

[2] These retired officers, who were the plaintiffs at the outset of the litigation below, died in the course of subsequent proceedings. Their widows, as executrixes of their estates, are the petitioners herein. For convenience, we use "petitioners" to refer to both the officers and their widows.

the court's ruling raised petitioners' active duty pay to the 07 grade, it did not promote them from captains to rear admirals. Pet. App. 3a-4a, 34a-35a.

2. At the time petitioners retired, the Secretary of the Navy, acting for the President, had discretion pursuant to 10 U.S.C. (1970 ed.) 5149(b) to promote retiring AJAGs to the rank of rear admiral (lower half) on the retired list, which would have entitled petitioners to retired pay at pay grade 07 (*ibid.*).[3] This discretion was not exercised by the Secretary of the Navy, however. Accordingly, both petitioners retired at pay grade 06, the pay grade associated with their rank as captains, rather than at the higher active duty pay they had been awarded in *Selman I*. Pet. App. 4a-5a, 35a-36a.

In 1976, the officers petitioned the Board for Correction of Naval Records (BCNR or the Board) for the higher retired pay grade, alleging that the Secretary of the Navy had never been given the opportunity to exercise the discretion delegated to him by the President pursuant to Section 5149(b) to promote them to rear admirals (lower half) when they retired. In support of their petitions, the officers produced letters from Senators John Chafee and John

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[3] 10 U.S.C. (1970 ed.) 5149(b) read in pertinent part:

> An officer who is retired while serving as Assistant Judge Advocate General of the Navy under this subsection or who, after serving at least twelve months as Assistant Judge Advocate General of the Navy, is retired after completion of that service while serving in a lower rank or grade, may, in the discretion of the President, be retired with the rank and grade of rear admiral (lower half). If he is retired as a rear admiral, he is entitled to retired pay in the lower half of that grade, unless entitled to higher pay under another provision of law.

W. Warner, who had served as Secretaries of the Navy at the time the officers retired. Both Senators stated that they would have promoted petitioners had they been given the opportunity to do so. Pet. App. 4a-5a, 36a-37a & n.4.

In 1981, the BCNR declined to act on the petitions (Pet. App. 50a-98a). The Board stated (*id.* at 59a, 84a-85a) that since there were "no specific criteria to be applied in determining whether an officer is deserving of retirement as a rear admiral pursuant to [Section 5149(b)]," it "was unable to conclude that Presidential discretion * * * should have been exercised." Instead, the BNCR referred both petitions to the current Secretary of the Navy "for his determination as to whether or not Petitioner[s] should have been retired in the grade of rear admiral (lower half)" (Pet. App. 67a, 92a), noting (*ibid.*) that "the current Secretary * * * still holds the authority to exercise Presidential discretion under [Section 5149(b)]." The current Assistant Secretary of the Navy, Manpower and Reserve Affairs, summarily denied both petitions on July 16, 1982 (Pet. App. 6a, 38a).

3. Two months later, petitioners filed suit in the United States Claims Court,[4] alleging that although they had not been promoted to the rank of rear admiral (lower half) on retirement, their retired pay nevertheless should be recomputed at the 07 pay grade at which they were compensated for their active duty service as a result of *Selman I*. Alternatively, they claimed that the Assistant Secretary of

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[4] Petitioners initially filed their action in the then United States Court of Claims on September 30, 1982. Effective October 1, 1982, jurisdiction was transferred to the new United States Claims Court. Pet. App. 6a.

the Navy's July 16, 1982 refusal to promote them should be overturned because it was arbitrary and capricious.

The court rejected the latter argument at the outset. It explained that since Section 5149(b) appointments are "entirely discretionary," petitioners could demonstrate no entitlement to a promotion and, therefore, no entitlement to a money judgment. Because the Claims Court's jurisdiction could be invoked only on the basis of a claim for money damages, the court held that it lacked jurisdiction to review the July 16, 1982 decision of the Secretary, acting through the Assistant Secretary. Pet. App. 38a-41a.

The court next rejected petitioners' claim that they were entitled to retired pay at the 07 grade by virtue of the fact that they had been paid at that grade during their active service as AJAGs. As the court noted, this claim turned on the proper construction of 10 U.S.C. 1201 and 1401 and 10 U.S.C. (1970 ed.) 6323, which provide that retired pay is based upon the basic pay of the "grade" in which the officer retired.[6] Petitioners claimed that these provisions

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[6] Captain Sharratt retired after 20 years of active service under 10 U.S.C. (1970 ed.) 6323, which provided in pertinent part:

> (c) Unless otherwise entitled to a higher grade, each officer retired under this section shall be retired—
>
> (1) in the highest grade, permanent or temporary, in which he served satisfactorily on active duty as determined by the Secretary of the Navy * * *.

Captain Selman was retired for physical disability under 10 U.S.C. 1201 and 1401. Section 1401 provides that retired pay shall be based on the "monthly basic pay of grade to which member is entitled under [10 U.S.C.] 1372." Section 1372, in turn, provides in pertinent part:

> Unless entitled to a higher retired grade under some other provision of law, any member of an armed force

refer to pay grades—*e.g.*, 06, 07, 08, etc., but the government contended that they refer to officer grades—*i.e.*, commander, captain, rear admiral, etc. The Claims Court agreed with the government that when the word "grade" is used without a qualifying adjective in the retired pay statutes, it invariably refers to "officer grade." Since petitioners had never served in the officer grade of rear admiral, the court held that their retired pay was properly computed on the basis of the 06 pay grade applicable to captains. Pet. App. 41a-49a.

4. The court of appeals affirmed (Pet. App. 1a-31a). In that court, petitioners advanced two separate legal theories. First, they alleged that the BCNR's action was arbitrary and capricious because the Board itself should have acted under 10 U.S.C. 1552 * to correct the error that occurred when Secre-

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who is retired for physical disability under section 1201 or 1204 of this title * * * is entitled to the grade equivalent to the highest of the following:

(1) The grade or rank in which he is serving on the date when his name is placed on the temporary disability retired list * * *.

(2) The highest temporary grade or rank in which he served satisfactorily, as determined by the Secretary of the armed force from which he is retired.

* 10 U.S.C. 1552 provides in pertinent part:

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice * * *. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

taries Chafee and Warner were not given the opportunity to promote them, rather than referring their claims to the current Secretary of the Navy (Pet. App. 6a-7a). Second, they alleged, as they had in the Claims Court, that they were entitled to be paid on the basis of the 07 pay grade associated with the rank of a rear admiral (lower half) since they had been paid on that basis while serving as AJAGs (Pet. App. 7a-8a).

At the outset, the court of appeals held, contrary to the Claims Court, that the latter court had jurisdiction to review the Board's referral of the officers' petitions to the current Secretary and the denial of the petitions by the Secretary, acting through the Assistant Secretary. According to the court of appeals (Pet. App. 9a-10a), the Secretary's "action, or decision not to act," was taken not pursuant to the discretionary authority granted in Section 5149(b), but rather pursuant to 10 U.S.C. 1552, which provides for the Secretary, acting through the BCNR, " 'to correct an error or remove an injustice.' "

The court of appeals concluded, however, that neither the Board nor the Secretary had acted arbitrarily or capriciously in declining to promote petitioners, even though the former Secretaries had stated they would have decided the issue differently (Pet. App. 10a-15a). The court noted (Pet. App. 11a (emphasis by the court)) that "[t]here is no requirement that the BCNR *must* take final action in any situation" and that it therefore "was entirely proper for the BCNR to merely pass the record to the [current] Secretary so that he could determine the appropriate action." The court further observed (*id.* at 19a-20a) that a Service Secretary "does not act in such matters on his own motion, when in office," but rather "on the basis of advice emanating from the bureaus

and offices that have cognizance of the matter at hand." In this regard, the court took cognizance (*id.* at 21a) of strenuous objections made by the Bureau of Naval Personnel that "the promotion of any officer without the recommendation of a selection board would be destructive of morale and resented by officers of every rank whose promotions had to be passed on by such a board."[7] The court accordingly determined that there was sufficient evidence before the BCNR and the current Secretary to support the decision that petitioners' promotion in the retirement ranks was not warranted, and there was therefore no injustice to correct, notwithstanding the former Secretaries' ex post facto opinions that they would have promoted the officers, had they been given the opportunity. Although the court acknowledged that the Secretary had committed a technical violation of 32 C.F.R. 723.7 by failing to state expressly his reasons for denying the promotions, it held that any such error was harmless because the basis for the action—the objection by the Bureau of Navy Personnel—was easily discernible from the evidence that was submitted by the Board as part of the administrative record. Pet. App. 14a-16a.

With respect to petitioners' alternative argument, the court of appeals held, as had the Claims Court, that the word "grade," as used in the statutes governing the computation of retired pay, means "officer grade," not "pay grade" (Pet. App. 23a-30a).

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[7] The court of appeals noted (Pet. App. 21a-22a) that the Bureau's objection could be taken as disagreement with 10 U.S.C. (1970 ed.) 5149(b) itself. Nevertheless, the court held that that fact would not prevent the Secretary from adopting the Bureau's position as his own since "there is nothing to show that Congress intended to require *any* promotions" (Pet. App. 22a (emphasis added)).

ARGUMENT

The decision of the court of appeals is correct and represents nothing more than a routine exercise in statutory construction. Moreover, the court's decision does not conflict with any decision of this Court or of any other court of appeals. Further review therefore is not warranted.

1. Petitioners' principal contention (Pet. 12-15, 18-23) is that the court of appeals erred in not remanding this case to the Secretary for the entry of findings as to why he denied their claims for promotion to rear admiral on the retired list. They rely (*id.* at 12) on Navy regulations (32 C.F.R. 723.7 and 32 C.F.R. 723.3(e)(5)) that require that a decision denying relief must be accompanied by a statement of reasons. As noted above (page 8, *supra*), the court of appeals considered this issue, but concluded that the omission of findings was harmless error—a conclusion that petitioners now claim (Pet. 14) "introduces a wild card into the standards of judicial review of administrative decisions, encourages laxity by administrative agencies and, if unchecked, will ultimately increase the workload of federal courts in reviewing administrative agency decisions."

Petitioners' objections are quite overstated. The court of appeals did not condone the omission of administrative findings; to the contrary, it stated expressly (Pet. App. 15a) that it "[did] not sanction such action" but "that, in this case, the error is harmless." The court reasoned that the omission was not fatal here because it was not left " 'completely in the dark as to the facts and evidence upon which the [Secretary] * * * based his judgment' " (Pet. App. 15a, quoting *USV Pharmaceutical Corp.* v. *Secretary of HEW*, 466 F.2d 455, 462 (D.C. Cir. 1972)), but

rather could discern the basis for the denial from the record.

That record, as noted above (page 8, *supra*) and as petitioners acknowledge (Pet. 9), included a recommendation against promotion by Vice Admiral James D. Watkins, the Chief of Naval Personnel. Vice Admiral Watkins believed that it would be inequitable to promote petitioners to rear admiral (lower half) rank on retirement since they had not been appointed to that rank by a selection board, as is the case with other officers retired at comparable rank. The court of appeals thus understood, and petitioners are well aware, that the current Secretary of the Navy denied their claims because the views of the Chief of Naval Personnel prevailed. Since the administrative action could readily be reviewed by the court to the extent necessary to determine that it was not arbitrary or capricious (Pet. App. 15a), a remand of this case, which has been pending before the BCNR or the courts for eight years, for the entry of a statement of reasons would exalt form over substance.[8] Furthermore, the court of appeals correctly

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[8] Contrary to petitioners' assertion (Pet. 13-14), the decision below does not conflict with *Environmental Defense Fund* v. *EPA*, 465 F.2d 528 (D.C. Cir. 1972), or *USV Pharmaceutical Corp.* v. *Secretary of HEW*, 466 F.2d 455 (D.C. Cir. 1972). Both of those cases stand for the unremarkable proposition, with which the decision below does not take issue, that administrative agencies generally are required to provide a statement of the reasons underlying their actions. 466 F.2d at 461-462; 465 F.2d at 538-541. Neither of those cases involved the situation presented here, in which effective judicial review is possible, notwithstanding the lack of a statement of reasons, by reference to a record that clearly discloses the basis for the administrative action. Indeed, in *Environmental Defense Fund* v. *EPA*, 465 F.2d at 537, the court made clear that it "do[es] not demand sterile formality. *In appropriate*

concluded (Pet. App. 14a) that the Secretary's decision was entitled to a presumption of administrative regularity and that petitioners failed to rebut that presumption by producing any evidence that the Secretary had acted on the basis of anything other than the record before him.

2. Petitioners also argue that both courts below construed the applicable military retirement statutes incorrectly and in a manner inconsistent with *Powers* v. *United States*, 401 F.2d 813 (Ct. Cl. 1968). In fact, the courts' interpretation of the statute is manifestly correct and is entirely consistent with *Powers*, which was a decision by the predecessor of the court below and thus would not present an inter-circuit conflict in any event.

As both courts below noted (Pet. App. 42a-43a; *id.* at 26a), the question of statutory construction presented by this case—whether the word "grade," as used in the retired pay statutes, refers to "pay grade" or "officer grade"—"[n]ormally * * * is of no consequence because pay grades are strictly correlated to officer grades." See 37 U.S.C. 201(a). The question is of significance in this case only because of the court of appeals' holding in *Selman I* that AJAGs who held the officer grade of captain nevertheless were entitled to the pay grade of rear admiral (lower half) while serving as AJAGs. Indeed, any continuing significance of even this narrow question has been eliminated by the repeal of 37 U.S.C. (1976 ed.) 202(*l*) (see 94 Stat. 2904), on which the holding in *Selman I* was based.

In any event, the lower courts' resolution of the discrete question of statutory construction presented

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cases, if the necessary articulation of basis for administrative action can be discerned by reference to clearly relevant sources other than a formal statement of reasons, we will make the reference" (emphasis added; footnote omitted).

here is correct. As noted above (note 5, *supra*), Captain Sharratt retired after 20 years of active service pursuant to 10 U.S.C. (1970 ed.) 6323(c). He thus was entitled to be retired "in the highest grade or rank in which he served satisfactorily." Likewise, Captain Selman, who retired for reasons of physical disability, was entitled to be retired at "[t]he highest temporary grade or rank in which he served satisfactorily" (10 U.S.C. 1372(2)). As the courts below pointed out (Pet. App. 28a (emphasis by the court); *id.* at 44a), the plain language of the statute defines the word "grade," for purposes of Title 10, as "a step or degree, in [the graduated] scale of *office* or *military rank*." See 10 U.S.C. 101(18). Both courts further noted (Pet. App. 44a; see also *id.* at 28a) that "[w]hile the concept of pay grades is used from time to time in title 10, * * * its use is carefully delineated by reference to the full phrase 'pay grade.' By contrast, whenever 'grade' is used without a qualifying adjective, it invariably refers to what we have been terming as 'officer grade.' "

As both courts below recognized (Pet. App. 28a-29a, 45a-48a), *Powers* v. *United States*, *supra*, on which petitioners rely (Pet. 15-16), in fact supports the view that the word "grade," as used in Title 10, refers to "officer grade," rather than "pay grade." The plaintiff in *Powers* had served as deputy and assistant JAG in the grade of captain until his appointment to the grade of rear admiral for such time as he should continue to serve as deputy and assistant JAG. Because 37 U.S.C. (1976 ed.) 202(i)(3) entitled deputy JAGs to be paid at "the highest rate of their rank," Powers skipped the 07 pay grade applicable to rear admirals of the lower half and was paid at the higher rate applicable to the rank of rear admiral—the 08 pay grade applicable to rear ad-

mirals of the upper half. Upon his retirement under 10 U.S.C. (1970 ed.) 6323(e), Powers received retired pay based on the 07 pay grade at which rear admirals of the lower half were compensated, because the government reasoned that 07 was the "basic pay" of the grade (rear admiral) in which Powers retired. The Court of Claims reversed on two separate grounds (401 F.2d at 815): First, that the "grade" at which Powers had retired was rear admiral of the upper half, not rear admiral of the lower half. Second, "[e]ven if [it] were not to consider rear admiral of the upper half and lower half as separate grades," there was nothing any more "basic" about the 07 pay grade than the 08 pay grade with respect to the grade of rear admiral. Because the grade of rear admiral peculiarly has both pay grades associated with it, the court concluded that Powers' retired pay should be based on the higher, 08 rate of pay that he had actually received.

The *Powers* court's discussion makes clear that it viewed the word "grade," as used in Section 6323, as referring to officer grade and not pay grade; otherwise, the foregoing, detailed analysis would have been unnecessary. Moreover, the broad language contained in the opinion on which petitioners apparently rely (Pet. 15)—"that the statutory scheme clearly bares the Congress' intention that plaintiff's retired pay be based upon the highest rate of pay he received while on active duty" (401 F.2d at 814)—is dictum that merely describes the ultimate result reached by the court. The narrow holding of the case is that when there are two pay grades associated with an officer's retired officer grade, the retired pay must be computed on the basis of the pay actually received. Since neither of the officers involved in this case ever served

in an officer grade higher than captain, and since only one pay grade—grade 06—is associated with that officer grade, their retired pay was correctly computed under the controlling statutes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
ANTHONY J. STEINMEYER
ELOISE E. DAVIES
Attorneys

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-1438

SOPHIA E. SELMAN, as Executrix of the Estate of RICHARD J. SELMAN, Deceased,

and

SHIRLEY MARIE SHARRATT, as Executrix of the Estate of GEORGE S.H. SHARRATT, JR., Deceased,

Petitioners,

v.

THE UNITED STATES,

Respondent.

REPLY TO BRIEF FOR UNITED STATES IN OPPOSITION

Penrose Lucas Albright
2306 South Eads Street
Arlington, VA 22202
(703) 979-3242
Attorney for Petitioners

Mason, Mason & Albright
Of Counsel

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of the Estate of RICHARD J.
SELMAN, et al, Petitioners

v.

THE UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

REPLY TO BRIEF FOR UNITED STATES IN OPPOSITION

In reply to the Solicitor General's Brief for the United States in Opposition, Petitioners submit the following comments and counter-arguments.

I.

The Secretary's Failure to Make Required Administrative Findings

The Government, in its Brief responding to the Petition for Writ of Certiorari, correctly states the U.S. Court of Appeals for the Federal Circuit "did not condone the omission of administrative findings" but found "the error to be harmless."

What the Government fails to refute is that the Court of Appeals was inferring (really guessing) the basis on which the Secretary acted.

As pointed out on pages 20 and 21 of the Petition there are various grounds under which the Secretary might have considered he was acting. Thus the Secretary may have considered he was acting (or declining to act) "for the President" under 10 U.S.C. §5149(b) with no strings attached as

the Government and lower Court both thought. Or he might have considered he was acting, as constrained under 10 U.S.C. §1552 to correct an error, as former Secretaries Chafee and Warner would have acted given the opportunity to do so, as the Court of Appeals thought.

Yet further, he may have acted on non-civilian recommendations obtained outside Section 1552 channels without informing the Board, Petitioners or their counsel.

Petitioners' discovery to determine the basis for the Secretary's actions was cut off because the lower Court concurred with the Government that the Secretary of the Navy could and did act directly under §5149(b). Moreover, because there was neither discovery nor trial, evidence that the

Secretary had not treated all AJAGs alike, contrary to the Court's premise, was never brought to light.

The Government has not cited any case, in which required administrative findings were not made, that it was proper on judicial review to deny discovery and select, among conflicting possible rationales, a basis to sustain the action.

The Government does not deny that this case, if permitted to stand, will establish such a precedent. Nor does it deny that, at the very least, it tells those in the Armed Services, veterans and their widows that in the realm of judicial review they are second class citizens.

II.

The Court Overturned a Longstanding Judicial and Administrative Interpretation to Compute Retired Pay on Basis of Highest Pay Received

A considerable portion of the Government's Brief relates to the lower Courts' distinction of Powers v. United States, 401 F.2d 813, 185 Ct. Cl. 481 (1968), with the instant case.

But it is significant to note that the Government does not dispute that Powers v. United States has been a keystone for subsequent administrative decisions that military retirement pay should be based on the highest active duty pay received.

On the question of whether or not certiorari should be granted, the issue of whether Powers should be construed narrowly or has been effectively overruled does not seem of over-

riding importance, albeit we submit the Courts and Government are wrong.

What is important is that Powers with a number of other cases were followed by both the Comptroller General of the United States and the Department of Justice for the broad proposition that retired pay of members of the Armed Services should be based on the highest rate of pay received on active duty.

This is confirmed by 49 Comp. Gen. 618 (1970) wherein the Comptroller held:

> We have recently been advised by the Assistant Attorney General, Civil Division, that the Department of Justice is unaware of any argument not previously presented to the Court of Claims which might persuade it to reverse its holdings in Satterwhite v. United States, 123 Ct. Cl. 342 (1952); Friestedt v. United States, 173 Ct. Cl. 447 (1965); Neri v. United States, 145 Ct. Cl. 537

> (1959); Powers v. United States, 185 Ct. Cl. 481 (1968); and Miller v. United States, supra, [180 Ct. Cl. 872 (1967)], which he stated indicate the disposition of the Court to hold that the language in the various statutes indicates the intent of Congress that the retired pay of members of the armed services should be based upon the highest rate of pay received on active duty.
>
> Upon further review of the question it appears that the Department of Justice has presented to the Court of Claims every argument suggested by us in this class of cases. On the basis that further litigation would result in no material change in its interpretation of the law, we have concluded that we will follow the broad principle enumerated by the Court of Claims in those cases.

The foregoing was subsequently followed in a Comptroller General's decision of May 3, 1976, File B-184382. Moreover, the Comptroller's opinion in File B-198516 of July 25, 1980, held when the noun "grade" is used [in

Title 10, U.S. Code] without qualifying or definitive adjectives, such "grade" may be an "officer" or "pay" grade.

But the lower Courts ignored these administrative interpretations. Whatever may have been the reasons for their decisions, observance of long-standing administrative law principles were not among them.

III.

Conclusion

The BCNR didn't make findings that it should have made. The Secretary of the Navy was required to make findings, but he didn't. Petitioners were denied discovery by the lower Court because it thought the Secretary could and did act retroactively under §5149(b) with unfettered discretion. The Court of Appeals in the absence of

required findings or any discovery or trial, postulated the Secretary acted under a different statute, surmised a reason for his action under such statute, held this reason was proper if (assuming contrary to fact) it was applied to all, and finally construed retirement pay statutes in Title 10 diametrically opposite to all prior applicable precedents, administrative and judicial.

It is instructive that the Government does not deny the case represents a significant erosion to judicial remedies and rights heretofore available to members of the Armed Forces. But for their sacrifices, now and in the past, we would not be a free country. So Government at all levels should bend over backwards to ensure these people are not disen-

franchised from their rights as citizens, whether constitutional or statutory, more than the nature of the military profession demands.

The petition for certiorari should be granted.

Respectfully submitted,

Penrose Lucas Albright

2306 South Eads Street
Arlington, Virginia 22202
(703) 979-3242

Attorney for Petitioners

May 18, 1984